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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 102

ADMIRAL DEWEY ADAMSON, APPELLANT,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MAY 7, 1946.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from Superior Court for County of Los Angeles	1	1
Information	1	1
Minute entries:		
Arraignment and plea	6	4
Withdrawal of counsel for defendant	7	4
Trial	8	4
Denial of motion for advised verdict of acquittal	15	7
Verdicts and motion for new trial	17	8
Instructions to jury (modified and given)	19	9
Instructions to jury (refused)	33	16
Verdicts	60	30
Minute entry of motion for new trial	62	30
Motion for new trial	63	31
Minute entry of order denying motion for new trial, and judgment	66	32
Judgments	68	33
Commitment death sentence	72	35
Notice of appeal	75	37
Request for record on appeal, etc.	76	37
Clerk's certificate (omitted in printing)	80	
Reporter's transcript of trial	81	40
Caption and appearances	81	40
Testimony of John W. Maurer	84	41
Frank R. Webb	91	45
Frank R. Webb (recalled)	106	54
John W. Maurer (recalled)	108	55

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Record from Superior Court for County of Los Angeles
Continued

Testimony of—Continued	Original	Print
Mrs. Maud B. Watts	130	69
Mrs. Eulalie Massey	151	82
Frank H. Heck	195	108
Mabel G. Vandiver	207	116
Ray H. Pinker	237	134
Robert Frick	247	141
Ken L. Osmon	278	159
James R. Ferguson	282	162
Mrs. Lilly W. Bailey	306	176
Mrs. Frances J. Turner	314	181
John B. Larbaig	329	191
Catherine T. May	392	227
Harry W. Rogers	408	238
John B. Larbaig (recalled)	473	275
E. J. Long	478	278
Mrs. Marie Massey	493	287
Mrs. Isabel Turner	506	295
William H. Brennan	514	299
G. H. Wiseman	559	325
Defendant's motion to strike	565	328
Defendant's motion for advised verdict and denial thereof	565	329
Renewal of motion for advised verdict and denial thereof	566	330
Judgment and sentence	570	331
Reporters' certificate (omitted in printing)	575	
Judge's certificates	576	334
Reporter's supplemental transcript	579	335
Caption and appearances	579	335
Argument on behalf of the State	580	335
Rebuttal argument on behalf of the State	637	369
Reporter's certificate (omitted in printing)	655	
Judge's certificates	656	379
Proceedings in Supreme Court of California	659	381
Opinion, Traynor, J.	659	381
Petition for rehearing	680	394
Order denying petition for rehearing	703	408
Judgment	704	409
Petition for appeal and denial thereof	704a	410
Assignments of error	706	410
Order allowing appeal	714	413
Citation and service (omitted in printing)	715	
Præcipe for transcript of record	717	414
Clerk's certificates (omitted in printing)	720	
Statement of points to be relied upon and designation of record	722	415
Order granting motion for leave to proceed in forma pauperis	728	418
Order noting probable jurisdiction	729	418

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

S. C. No. 98734

INFORMATION

Murder—Count I.
Burglary—Counts II, III, IV and V.
2 Priors.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

VS.

ADMIRAL DEWEY ADAMSON, Defendant

INFORMATION

Count I

The said Admiral Dewey Adamson is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Murder a felony, committed as follows: That the said Admiral Dewey Adamson on or about the 24th day of July, 1944 at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously and with malice aforethought murder one Stella Blauvelt, a human being.

Count II

For a further and separate cause of action, being a different offense from, but connected in its commission with, the charge set forth in Count I hereof, the said Admiral Dewey Adamson is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Burglary, a felony, committed as follows:

That the said Admiral Dewey Adamson, on or about the [fol. 2] 24th day of July, 1944, at and in the County of Los Angeles, State of California, did willfully enter the room and apartment occupied by Stella Blauvelt, located at number 744 South Catalina, in the City of Los Angeles, County

and State aforesaid, with the intent then and there and therein to unlawfully and feloniously commit theft.

Count III

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count II hereof, the said Admiral Dewey Adamson is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Burglary, a felony, committed as follows:

That the said Admiral Dewey Adamson, on or about the 10th day of June, 1944, at and in the County of Los Angeles, State of California, did willfully enter the house and building occupied by Frank Hokr, located at number 1962 West 27th Street, in the City of Los Angeles, County and State aforesaid, with the intent then and there and therein to unlawfully and feloniously commit theft.

Count IV

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charges set forth in Counts II and III hereof, the said Admiral Dewey Adamson is accused by the District [fol. 3] Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Burglary, a felony, committed as follows:

That the said Admiral Dewey Adamson, on or about the 16th day of May, 1944, at and in the County of Los Angeles, State of California, did willfully enter the house and building occupied by Mrs. Lloyd Goble, located at number 961 South Oxford, in the City of Los Angeles, County and State aforesaid, with the intent then and there and therein to unlawfully and feloniously commit theft.

Count V

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charges set forth in Counts II, III and IV hereof, the said Admiral Dewey Adamson is accused by the District Attorney of and for the County of Los Angeles, State

of California, by this information, of the crime of Burglary, a felony, committed as follows:

That the said Admiral Dewey Adamson, on or about the 10th day of August, 1944, at and in the County of Los Angeles, State of California, did willfully enter the house and building occupied by C. E. Mourning, located at number 1566 West 27th Street, in the City of Los Angeles, County and State aforesaid, with the intent to enter and there and therein to unlawfully and feloniously commit theft.

That before the commission of the offenses hereinabove [fol. 4] set forth in this information, said defendant Admiral Dewey Adamson was, in the Circuit Court of the State of Missouri, in and for the County of Jackson, convicted of the crime of Burglary and Larceny, and the judgment of said Court against said defendant, in said connection, was, on or about the 3rd day of February, 1920, pronounced and rendered, and said defendant served a term of imprisonment therefor in the State Prison.

That before the commission of the offenses hereinabove set forth in this information, said defendant Admiral Dewey Adamson was, in the Circuit Court of the State of Missouri, in and for the County of Jackson, convicted of the crime of Robbery, a felony, and the judgment of said Court against said defendant in said connection, was, on or about the 30th day of June, 1927, pronounced and rendered, and said defendant served a term of imprisonment therefor in the State Prison.

The former convictions herein alleged against said defendant, Admiral Dewey Adamson, are hereby charged against him with respect to each of the counts hereinbefore set forth, and by reference the same are hereby made a part of said counts.

Fred N. Houser, District Attorney, of and for the County of Los Angeles, State of California. By
Kenneth J. Thomas, Deputy.

[fol. 5] (Endorsed) S. C. No. 98734. D. A. No. 115823. In the Superior Court of the State of California in and for the County of Los Angeles: The People of the State of California, Plaintiff vs. Admiral Dewey Adamson, Defendant. Information Murder—Count I. Burglary—Counts II, III, IV, V. 2 Priors. Filed in open Superior Court of the County of Los Angeles, State of California, on motion of

the District Attorney of said Los Angeles County. Dated: Sep. 14, 1944. J. F. Moroney, Clerk. By G. E. Hubbard, Deputy. Fred N. Howser, District Attorney.

[fol. 6] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—September 18, 1944

Deputy District Attorney Charles Matthews and the defendant without counsel, present:

The Public Defender is appointed by the Court as counsel for the defendant.

The defendant is duly arraigned, states his true name to be as charged in the information, waives reading of the information and time to plead, regularly enters his plea of "Not Guilty as charged in each count of the information", denies each prior conviction as alleged therein and the trial of the action is thereupon set for November 9, 1944 at 9:00 A. M. and transferred to Department 43.

[fol. 7] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—October 3, 1944

Deputy District Attorney S. Ernest Roll and the Defendant with his counsel, Deputy Public Defender R. F. Bird, present.

The Public Defender is allowed to withdraw as counsel for the defendant.

[fol. 8] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 14, 1944

Cause is called for trial as to Counts 1 and 2 of the information.

Deputy District Attorney S. Ernest Roll and the Defendant with his counsel, Morris Lavine by Milton B. Safier, present.

Defendant admits each prior conviction as alleged in the information as follows: Burglary and Larceny, convicted in the Circuit Court of the State of Missouri, Jackson County, upon which judgment was rendered on or about February 3, 1920 and admits having served a term of imprisonment in the State Prison and Robbery, convicted in the Circuit Court of the State of Missouri, Jackson County, upon which judgment was rendered on or about June 30, 1927 and admits having served a term of imprisonment therefor in [fol. 9] the State Prison.

Jury is in process of impanelment.

Prospective Jurors are admonished and trial is continued to November 15, 1944, at 9:30 A. M.

[fol. 10] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 15, 1944

Trial is resumed.

Deputy District Attorney S. Ernest Roll and the Defendant with his counsel, Milton Safier, present.

It is stipulated that the prospective jurors are in attendance.

The following jurors are sworn to try the cause:

Mrs. Frances F. McKellar, Mrs. Luella M. Dooley, Mrs. Elizabeth K. Frohman, Mrs. Dorothea J. Schomner, Mrs. Doris L. Hayden, Mrs. Ruth M. Wilton, Mrs. Elizabeth Welsh, Mrs. Flora D. Smith, Mrs. Iva B. Dickie, Mrs. Lorene Yates, Mrs. Dorothy M. Mathis, Mrs. Gladys M. Faulkner.

It appearing to the Court that this case is likely to be a protracted one, It Is Ordered that two alternates be selected and Ralph W. Hickey and Mrs. Hazel B. Stewart are sworn as alternates.

[fol. 11] The Court now orders a daily transcript of the testimony.

Information is read and plea is stated.

The following witnesses are sworn and testify on behalf of the People: John W. Maurer, Dr. Frank R. Webb, Mrs. Maude B. Watts and Mrs. Eulalie Massey.

The Court now orders that Sgt. Harry Rogers of the Sheriff's Fingerprint Section, be and he is appointed under Section 1871 C. C. P. to examine certain fingerprints in this case.

Jury is admonished and trial is continued to November 16, 1944 at 9:30 A. M.

[fol. 12] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 16, 1944

Trial is resumed.

Deputy District Attorney S. Ernest Roll and the Defendant with his counsel, Milton Safier, present.

It is stipulated that the Jurors and Alternates be in attendance.

The following witnesses are sworn and testify on behalf of the People: Frank H. Heck, Mrs. Mabel B. Vandiver, Ray H. Pinker, Robert Frick, Kenneth Osmon, James R. Ferguson, Mrs. Lillie H. Bailey and Mrs. Francis Jean Turner.

Jury is admonished and trial is continued to November 17, 1944 at 9:30 A. M.

[fol. 13] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 17, 1944

Trial is resumed.

Deputy District Attorney S. Ernest Roll and the defendant with his counsel, Milton B. Safier, present.

It is stipulated that the Jury and alternates are in attendance.

The defendant moves orally for a new trial on Counts 3, 4 and 5. Hearing on said motion is continued to November 24, 1944 at 9:00 A. M.

7
The following witnesses are sworn and testify on behalf of the People: John B. Larbaig, Mrs. Catherine E. May and Harry W. Rogers.

Jury is admonished and trial is continued to November 20, 1944 at 9:30 A. M.

[fol. 14] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 20, 1944

Trial is resumed.

Deputy District Attorney S. Ernest Roll and the Defendant with his counsel, Milton B. Safier, present.

It is stipulated that the jury and alternates are in attendance.

Harry Rogers resumes his testimony, John B. Larbaig is recalled and the following witnesses are sworn and all testify on behalf of the People: E. J. Long, Miss Marie Massey, Mrs. Isabel Turner, William H. Brennan and G. H. Wiseman.

People's Exhibits Nos. 1 and 2 (each a diagram), 3, 4, 8, 9, 10, 11, 12, 17, 18, 19, 21, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 36 and 37 (each a photo), 5 (electric cord), 6 (small door), 7 (beads), 13 (stocking foot), 14 and 15 (each a Handkerchief), 16 (napkin), 20 (negatives), 22, 23 and 30 (each a [fol. 15] fingerprint card) and 35 (stockings) are admitted and filed. The People rest.

Defendant rests.

Defendant's motion for an advised verdict of acquittal is denied.

Cause is argued. Jury is admonished and trial is continued to November 21, 1944 at 9:30 A. M.

[fol. 16] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 21, 1944

Trial is resumed.

Deputy District Attorney S. Ernest Roll and the defendant with his counsel, Milton B. Safier, present.

It is stipulated that the Jurors and Alternates are in attendance.

The argument is resumed and completed. The Court instructs the Jury. The Sheriff is sworn to take charge of the Jury, which retires to deliberate at 3:30 P. M. At 5:00 P. M. the Jury not having arrived at a verdict, the Sheriff is ordered to escort the Jurors to the Rosslyn Hotel for the night to return to the Jury Room for farther deliberations on November 22, 1944.

[fol. 17] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 22, 1944

Trial is resumed.

Deputy District Attorney S. Ernest Roll and the defendant with his counsel, Milton B. Safer, present.

At 8:45 A. M. the Jury returns to the Jury room from the hotel for further deliberations and returns into Court at 2:35 P. M. with the following verdicts to-wit:

Title of Court and Cause

"We, the Jury in the above entitled action, find the defendant Guilty of Murder, a felony, as charged in Count #1 of the information, and find it to be Murder of the First Degree".

This 22nd day of November, 1944.

Iva B. Dickie, Foreman.

[fol. 18] "We, the Jury in the above entitled action, find the defendant Guilty of Burglary, a felony, as charged in Count #2 of the information, and find it to be Burglary of the First Degree".

This 22nd day of November, 1944.

Iva B. Dickie, Foreman.

Verdicts and Instructions are filed. Jury is polled and each Juror answers in the affirmative. Jury is excused.

Defendant makes motion for a new trial. The hearing on said motion and the pronouncing of judgment and sentence are set for November 27, 1944 at 9:00 A. M.

Defendant is remanded.

[fol. 19] IN SUPERIOR COURT OF LOS ANGELES COUNTY

INSTRUCTIONS TO JURY—Filed November 22, 1944

General Instruction

Jury To Be Governed Solely By Evidence

You are here, ladies and gentlemen, for the purpose of trying the issues of fact that are presented by the allegations in the *information* filed by the *District Attorney* and the defendant's pleas thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charges against him. You are to be governed therefore solely by the evidence introduced in this trial and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion or prejudice, public opinion or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be, and which will express the individual opinion of each juror.

Given [as modified Refused]

Fricke, Judge.

[fol. 20]

General Instruction

Jury To Consider Evidence Only

You are the sole and exclusive judges of the weight of evidence and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case. It is the right of court and counsel to comment on the failure of defendant to explain or deny any evidence against him, and to comment on the evidence, the testimony and credibility of any witness; yet the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses.

But while you are the sole and exclusive judges of the facts and of the weight of evidence, you are to judge of the

[*Words enclosed in brackets erased in copy.]

facts upon the testimony and other evidence produced here in court. If any evidence has been admitted and afterwards stricken out, you must disregard entirely the matter so stricken out, and if any counsel has intimated by questions which the court has not permitted to be answered that certain things are, or are not true, you must disregard such questions and refrain from any inferences based upon them. If counsel, upon either side, have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are. If, however, counsel have stipulated or agreed to certain facts, you are to regard the facts so stipulated [fol. 21] to as being conclusively proven. If either party has during the trial admitted any fact or facts material to the matters involved in this case, such admission is to be deemed by you as proven against the party making such admission.

Given [as modified Refused]*

Fricke, Judge.

Evidence—Susceptible of Different Constructions

If the evidence in this case as to any particular count is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt.

You will notice that in this instruction this rule of law is made applicable to cases in which there are two opposing interpretations, each of which appears to you to be reasonable.

This rule of law does not apply in a case where there are two opposing constructions sought to be placed upon the evidence, one of which appears to you to be reasonable and [fol. 22] the other appears to you to be unreasonable.

In the latter case it would be your duty, under the law, to adopt the reasonable construction and reject the one which, in your judgment, appears to be unreasonable.

Given [as modified Refused]*

Fricke, Judge.

[*Words enclosed in brackets erased in copy.]

Presumption of Innocence

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral [fol. 23] certainty, of the truth of the charge."

~~Given~~ ~~has modified~~ Refused)*

Fricke, Judge.

Witness—Credibility of

The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case: The character of witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility and the facts as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with [fol. 24] his present testimony as to any matter material to the cause on trial [; and a witness may also be impeached by proof that he has been convicted of a felony.]*

A witness willfully false in one material part of his or her testimony is to be distrusted in others; that is to say,

[*Words enclosed in brackets erased in copy.]

the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but willfully and with the design to deceive, may treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced that he or she has in other particulars sworn to the truth.

Given as Modified [Refused]*

Fricke, Judge.

Experts

Duly qualified experts may give their opinion on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of [fol. 25] any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

Given [as modified Refused]*

Fricke, Judge.

Circumstantial Evidence

In order to convict the defendant upon the evidence of circumstances it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the information, but that the defendant was the one who committed such crime and that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant not guilty.

People v. McClain, 115 Cal. App. 505.

Given [as modified Refused]*

Fricke, Judge.

[*Words enclosed in brackets erased in copy.]

[fol. 26] Circumstantial Evidence—Effect of

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct evidence, which is the direct testimony of any eyewitness to a transaction, and the other is circumstantial evidence, which includes all evidence other than that of an eyewitness. Such evidence may consist of any acts, declarations or circumstances admitted in evidence tending to prove the crime charged, or tending to connect the defendant with the commission of the crime.

If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find; irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

Given [as modified Refused]*

Fricke, Judge.

[fol. 27] If you believe from all the evidence, beyond a reasonable doubt, that on or about the 24th day of July, 1944 at and in the County of Los Angeles, State of California, the defendant, Admiral Dewey Adamson was engaged in the commission of the crime of burglary, and that while in the commission of the said crime of burglary, he killed one Stella Blauvelt a human being, then you should find the defendant guilty of murder as charged in the information, and you should find it to be murder of the first degree.

Given [as modified Refused]*

Fricke, Judge.

Murder — Defined —

The defendant is charged in count 1 with the crime of murder.

Murder is the unlawful killing of a human being with malice aforethought.

Penal Code Sec. 187.

[*Words enclosed in brackets erased in copy.]

Such malice may be expressed or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the [fol. 28] circumstances attending the killing show an abandoned and malignant heart.

Penal Code Sec. 188.

All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree.

Penal Code Sec. 189.

In dividing murder into degrees the legislature intended to assign to the first as deserving of greater punishment, all murders of a cruel and aggravated character, and to the second all other kinds of murder which are murder at common law, and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: Is the killing willful (that is to say, intentional), deliberate and premeditated? If it is, the case falls within the first, and if not, within the second degree. There are certain kinds of murder which carry with them conclusive evidence of premeditation; these the legislature has enumerated in the code definition already given you, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder of the first degree. These cases are of two classes:

First. Where the killing is perpetrated by means of [fol. 29] poison, torture or lying in wait. Here the means used is held to be conclusive evidence of premeditation.

Second. Where the killing is done in the perpetration, or attempt to perpetrate, burglary or some one of the other felonies enumerated in the statute, here the occasion is made conclusive evidence of premeditation. Where the case comes within either of these classes the test question: Is the killing willful, deliberate and premeditated? is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence so far as these two cases are concerned, all difficulty as to the question of degree is removed by the statute.

In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity.

Penal Code Sec. 21:

A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probably and usual consequences of his own acts.

Given as Modified [Given as modified Refused]•

Fricke, Judge.

[fol. 30] The defendant is charged in Count 2 with burglary:

Any person who enters any house, room or apartment, with intent to commit grand or petty theft is guilty of burglary.

Penal Code, Section 459.

Given as Modified [Given as modified Refused]•

Fricke, Judge.

Murder—Penalty

The law of this State provides that every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury.

If you find that the defendant is guilty of murder in the first degree it will be your duty to fix the penalty. It is entirely for the jury to determine which of the two penalties is to be inflicted in case of murder in the first degree, the death penalty or confinement in the state prison for life. If the jury should fix the penalty as confinement in the state prison for life, you will so indicate in your verdict. If, however, you fix the penalty at death, [fol. 31] you will say nothing on this subject in your verdict, nor will you specify the death penalty in your verdict. In the exercise of your discretion as to which punishment

[•Words enclosed in brackets erased in copy.]

shall be inflicted you are entirely free to act according to your own judgment.

190 P. C.

Given [as modified Refused]*

Fricke, Judge.

Burglary—Degrees

You are instructed that every burglary of an inhabited dwelling-house or building committed in the night-time, and every burglary, whether in the daytime or night-time, committed by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree. All other kinds of burglary are of the second degree.

Sec. 460, Penal Code.

If you should find the defendant guilty of burglary, it will be your duty to determine the degree thereof, and to state such degree in your verdict.

Given [as modified Refused]*

Fricke, Judge.

[fol. 32] [File endorsement omitted.]

[fol. 33] IN SUPERIOR COURT OF LOS ANGELES COUNTY

DEFENDANT'S REQUESTED INSTRUCTIONS—Filed November 22, 1944

Defendant's Instruction No. —

You are instructed that the evidence in this case is circumstantial evidence. Where circumstantial evidence is relied upon the circumstances must not only be consistent with guilt but they must be inconsistent with any other rational hypothesis, and if from the evidence in this case there is a rational hypothesis of innocence you must acquit the defendant.

[Given as modified Refused]* Refused Covered.

Fricke, Judge.

[*Words enclosed in brackets erased in copy.]

Defendant's Instruction No. —

You are instructed that the evidence in this case is circumstantial evidence and that where the evidence is circumstantial evidence and there are two reasonable theories which you may adopt, one leading toward innocence and the other leading toward guilt, you must adopt that one leading toward innocence and reject that one leading toward guilt.

[Given as modified Refused]* Refused Covered.

Fricke, Judge.

[fol. 34] Defendant's Instruction No. —

You are instructed that where circumstantial evidence is relied upon as to any fact in the case and those circumstances are equally compatible with innocence or guilt, you must adopt those circumstances leading toward innocence and reject those circumstances leading toward guilt.

[Given as modified]* Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the law is not vindictive. Its policy is to protect the innocent. It deems it better that many guilty should escape than that one innocent person should be convicted and suffer punishment for a crime which has not been committed. Therefore the law encourages jurors and requires them to give the defendant the benefit of every reasonable doubt and to acquit him if the jurors, as reasonable men and women, conscientiously can find a [fol. 35] reasonable doubt in the case.

[Given as modified]*

Refused Argumentative and instructions on fact as far as first two sentences are concerned. Reasonable doubt covered by instruction given.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that where expert testimony is relied upon by either side, it is your right to consider any interest which the expert may have in the case. You have the right to reject the testimony of such expert if you believe

[*Words enclosed in brackets erased in copy.]

that by reason of his interest in the case his testimony is unreliable.

[Given as modified]*

Refused Covered.

Fricke, Judge.

[fol. 36] Defendant's Instruction No. —

You are instructed that you cannot convict the defendant in this case upon the opinion testimony of experts but must determine this case from facts introduced in evidence, and if the facts introduced in this case, exclusive of the testimony of experts, are insufficient to establish the offenses [of burglary]* charged as to any count in the information, you must acquit the defendant of such count or counts.

[Given as modified]*

Refused Not the law. There is no such rule as that in arriving at a verdict the jury must disregard the testimony of experts.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that a reasonable doubt may arise from the unsatisfactory nature of the prosecution's evidence and if the evidence is of such character as to leave a reasonable doubt in your mind you must acquit the defendant, irrespective of whether the defendant took the stand or [fol. 37] offered any proof.

[Given as modified]*

Refused Covered—1096a P. C.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that it is not necessary for the defendant in any event to prove his innocence if the defendant has elected in this case to rest upon the weakness of the prosecution's case, and if you find after a consideration of the prosecution's case that there is a reasonable doubt in your minds as to the guilt of the defendant, you must acquit him.

[Given as modified]*

Refused Covered 1096b P. C.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the defendant is presumed to be innocent until his guilt is clearly established by the evidence [fol. 38] beyond a reasonable doubt. All presumptions of law are in favor of the innocence of persons accused of the commission of crimes and every person so accused is presumed to be innocent until the contrary is shown and until his guilt is established by the preponderance of evidence in the trial of the case, and this presumption of innocence remains with the defendant at every stage of the trial unless and until the evidence convinces you to the contrary beyond all reasonable doubt.

[Given as modified]•

Refused Covered 1096a P. C.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that if you entertain a reasonable doubt as to the guilt of the defendant as to [any or all]• either of the counts in the information, you must give him the benefit of that doubt and acquit him; on such count or counts.

[Given as modified]•

Refused Covered—1096a P. C.

Fricke, Judge.

[fol. 39] Defendant's Instruction No. —

You are instructed that it is not sufficient to warrant the conviction of the defendant for the prosecution to awaken in your minds a suspicion that the defendant did any of the things alleged in the information. Neither is it sufficient for the prosecution to satisfy your minds that it is more probable that the defendant committed the offense or any of the offenses mentioned in the information than that he did not; before you are justified in finding him guilty the prosecution must go further and prove such facts against the defendant beyond a reasonable doubt.

[Given as modified]•

Refused Covered by general and reasonable doubt instructions.

Fricke, Judge.

[•Words enclosed in brackets erased in copy.]

Defendant's Instruction No. —

You are instructed that a reasonable doubt is that state of the case which, after a comparison and consideration of all the evidence, leaves your minds in that condition that you cannot say you feel an abiding conviction to a [fol. 40] certainty that the accused committed the offense.

[Given as modified]*

Refused Covered—1096a P. C.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that you cannot convict on mere suspicion, conjecture or guesswork, and if the evidence in this case leaves your minds in that state where you have to guess at the verdict or conjecture upon it or if it is based merely on suspicion, you must acquit the defendant.

[Given as modified]*

Refused Covered—1096a P. C.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that specific intent to commit larceny is an essential element of the crime of burglary and that whenever specific intent is an essential element of the offense, no presumption of law can arise as to the existence of such intent, for it is a fact to be proved, like any other fact in the case.

[Given as modified]*

Refused Covered by definition of burglary given.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the people to produce, the evidence offered should be viewed with distrust.

[Given as modified]*

Refused Abstract—not supported by evidence.

Fricke, Judge.

[*Words enclosed in brackets erased in copy.]

[fol. 42] Defendant's Instruction No. —

You are instructed that mere suspicion is not sufficient to justify a conviction.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the burden of proof is upon the prosecution to prove each and every element of the crime of burglary beyond a reasonable doubt. Specific intent is an essential element of the crime of burglary and the burden of proof is upon the prosecution to prove specific intent beyond a reasonable doubt.

[Given as modified]*

Refused Covered.

Fricke, Judge.

[fol. 43] Defendant's Instruction No. —

You are instructed that before you can convict the defendant of the crime of burglary you must find that he actually entered the premises with intent then and there to commit larceny. Unless you find that the defendant did actually enter the premises and also that he did so with intent to commit larceny you must acquit the defendant. The burden of proof is upon the prosecution to prove such intent beyond a reasonable doubt; that burden never shifts, and remains upon the prosecution throughout the whole case and if you believe from the evidence [as to any count or counts]* that the defendant did not enter the premises involved or that he did not have the specific intent to commit larceny, or if there is a reasonable doubt as to such entry and intent in your minds, then you must acquit the defendant of burglary.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that you cannot convict the defendant [fol. 44] of burglary unless you believe to a moral certainty

[*Words enclosed in brackets erased in copy.]

and beyond a reasonable doubt that the defendant entered the premises described in the information with the intent to commit grand or petty larceny.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that you cannot convict the defendant on mere suspicion, conjecture, guesswork, or surmise.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that a reasonable doubt may arise from the unsatisfactory nature of the prosecution's evidence and if the evidence is of such character as to leave a reasonable doubt in your mind you must acquit the defendant, [fol. 45] irrespective of whether the defendant took the stand or offered any proof.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

If you believe beyond all reasonable doubt that the defendant was guilty of some crime necessarily included in the information, but have a reasonable doubt as to whether the crime was murder or manslaughter, you must give him the benefit of that reasonable doubt and acquit him of murder and find him guilty of manslaughter only.

[Given as modified]*

Refused Defdt. is either guilty of murder (P. v. Fountain 170 Cal. 460) or not guilty.

Fricke, Judge.

[fol. 46] Defendant's Instruction No. —

You are instructed that if you believe that the defendant killed the decedent as charged in the information and that the killing was not excusable or justifiable and believe all

[*Words enclosed in brackets erased in copy.]

this to be proved to a moral certainty and beyond a reasonable doubt, but entertain a reasonable doubt as to whether the killing was murder in the first degree as defined in the instructions; you must acquit the defendant of that grade of the offense and you can only find him guilty, if you find him guilty at all, of murder in the second degree or of manslaughter, which are offenses included in the charge contained in the information, for the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged.

[Given as modified]•

Refused Killing was first degree as death by strangulation is a killing by torture and first degree murder P. v. Fountain, 170 Cal. 460—no reasonable inference but that killing was in perpetration of burglary P. v. Witt, 170 Cal. 104;

Fricke, Judge.

[fol. 47] Defendant's Instruction No. —

You are instructed that you are not bound to accept the opinion of any expert as conclusive but should give to it the credibility and weight to which you find it to be entitled. You also have a right to consider such evidence, together with your own inspection of the physical evidence and then form your own opinion, because you are the sole judges of the facts in this case.

[Given as modified]•

Refused Covered by statutory instruction—1127b. Penal Code.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that it is the policy of the law to zealously protect the innocent. In a criminal case the law clothes the defendant with a presumption of innocence and casts upon the people the burden of proving guilt beyond a reasonable doubt. The defendant is not obliged to prove his innocence or offer any proof thereon, and if the defendant elects not to take the witness stand but to rest upon what he believes to be the weakness or insufficiency of the [fol. 48] people's case, he has a right to so do and no infer-

[• Words enclosed in brackets erased in copy.]

ence or presumption of guilt arises from his failure to take the witness stand.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the fact that the prosecutor has a right to comment on the failure of the defendant to take the stand does not relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt and by competent and legal evidence.

People v. Sawaya, 46 Cal. App. 2d, 466.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the right of the prosecution to [fol. 49] comment on the failure of the defendant to take the stand cannot be used to supply a failure of proof by the prosecution.

People v. Zoffel, 35 Cal. App. 2d, 215

[Given as modified]*

Refused.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the burden of proof rests on the prosecution and the failure of the defendant to take the stand raises no presumption or inference of guilt.

People v. Zoffel, 35 Cal. App. 2d 215.

[Given as modified]*

Refused.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that if you find and are satisfied beyond a reasonable doubt that the defendant committed the [murder]*, homicide and that he was not in the act of [fol. 50] burglarizing the apartment, but that the [mur-

[*Words enclosed in brackets erased in copy.]

der]* homicide was committed upon a sudden quarrel or in the heat of passion, or in the commission of an unlawful act not amounting to a felony, then you cannot convict the defendant of anything greater than manslaughter.

[Given as modified]*

Refused Abstract—also under 1105 P. C. Burden was upon defdt. to show crime only amounted to manslaughter. Furthermore killing by strangulation, a fact here conclusively established makes the crime first degree murder so the law says death by torture is first degree murder. P v. Fountain, 170 Cal. 460.

Fricke, Judge.

Defendant's Instruction No. —

If you believe beyond a reasonable doubt that the defendant killed the deceased as charged in the information, and further believe that the killing was done while in the perpetration or attempt to perpetrate a felony, to-wit, burglary, and further believe that the killing was not manslaughter, nor justifiable, nor excusable, nor murder of the second [fol. 51] degree, but that it was murder of the first degree, it is within your discretion to determine whether he shall suffer death or confinement in the state prison for life. This discretion, however, should not be exercised by you arbitrarily, and its exercise should not be based upon passion or anything other than ~~than~~ a calm consideration of the evidence.

If, upon such consideration of the evidence, you doubt that the defendant should suffer the death penalty, then you should give him the benefit of that doubt and fix his punishment at imprisonment for life, provided, of course, you believe beyond all reasonable doubt that he is guilty of murder of the first degree.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that if you find that the killing in this case did not take place during the commission or attempted commission of burglary, and that the killing was done with-

[*Words enclosed in brackets erased in copy.]

out malice on the part of the defendant, then you can find him guilty only of manslaughter, if you find him guilty of [fol. 52] any crime.

[Given as modified]*

Refused Not the law—a killing by strangulation is first degree murder. P. Fountain, 170 Cal. 460.

—, Judge.

Defendant's Instruction No. —

You are instructed that the finding of the defendant's fingerprints on the door to the garbage disposal compartment, alone and of itself, is insufficient to justify a verdict of murder.

[Given as modified]*

Refused Comment on fact which the court does not desire to make. Since the evidence conclusively shows the commission of murder and there is other evidence such an instruction tends to mislead the jury. We are not dealing with a case of only fingerprint evidence. Defense not entitled to an instruction as to every bit of evidence.

Fricke, Judge.

[fol. 53] Defendant's Instruction No. —

You are instructed that mere suspicion, no matter how strong that suspicion may be, is not sufficient to justify a conviction.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the finding of the defendant's fingerprints on the door to the garbage disposal compartment does not give rise to any inference that the defendant committed murder, or killed the deceased.

[Given as modified]*

Refused Fallacious—also a comment on a matter of fact which the law does not permit counsel to make (1127 P. C.).

Fricke, Judge.

[*Words enclosed in brackets erased in copy.]

[fol. 54] Defendant's Instruction No. —

You are instructed that all murder which is perpetrated by means of poison or lying in wait, or torture, or by any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; all other kinds of murder are of the second degree.

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds, (1) voluntary—upon a sudden quarrel or heat of passion, and (2) involuntary—in the commission of an unlawful act not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution or circumspection.

You are instructed that before you can convict the defendant of murder in the first degree you must find and be satisfied beyond a reasonable doubt that the murder was committed in the perpetration or attempt to perpetrate burglary; unless you find and are satisfied beyond a reasonable doubt that the defendant unlawfully entered the apartment of the deceased with the intent to commit larceny, which is one of the elements of burglary, and that the defendant committed the murder while in the commission or attempt to commit such burglary, then you cannot find him [fol. 55] guilty of murder in the first degree, and your verdict, if you find that the defendant committed the homicide at all, would have to be murder in the second degree, or manslaughter.

[Given as modified] •

Refused Not the law—wholly ignores that a killing by torture is first degree murder by statute (P. C. 189) and this is a killing by torture (P v Fountain, 170 Cal. 460.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the presumption of innocence goes with the defendant throughout the whole trial, even until the verdict is rendered, and this presumption of innocence outweighs and overbalances all suspicion and sup-

[*Words enclosed in brackets erased in copy.]

position and can only be destroyed by proof of guilt beyond a reasonable doubt.

[Given as modified]*

Refused Covered 1096a P. C.

Fricke, Judge.

[fol. 56] Defendant's Instruction No. —

You are instructed that the gravamen of the crime of burglary is the unlawful entry with intent to commit theft. If you find as to the burglary count in the information that the accused entered the premises and that the intent to commit theft did not occur until after the entry, you must find him not guilty of the crime of burglary, for then the crime would be theft and not burglary.

[Given as modified]*

Refused.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that the defendant is presumed to be innocent until his guilt is clearly established by the evidence beyond a reasonable doubt. All presumptions of law are in favor of the innocence of persons accused of the commission of crimes and every person so accused is presumed to be innocent until the contrary is shown and until his guilt is established by the preponderance of evidence in the trial of the case, and this presumption of innocence remains with [fol. 57] the defendant at every stage of the trial unless and until the evidence convinces you to the contrary beyond all reasonable doubt.

[Given as modified]*

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that it is not necessary for the defendant in any event to prove his innocence if the defendant has elected in this case to rest upon the weakness of the prosecution's case, and if you find after a consideration of the prosecution's case that there is a reasonable doubt in

[*Words enclosed in brackets erased in copy.]

your minds as to the guilt of the defendant, you must acquit him.

[Given as modified] *

Refused Covered—1096a P. C.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that if weaker and less satisfactory [fol. 58] evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the People to produce, the evidence offered should be viewed with distrust.

[Given as modified] *

Refused Abstract.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that you cannot convict upon mere suspicion, conjecture or guesswork, and if the evidence in this case leaves your minds in that state where you have to guess at the verdict or conjecture upon it, or if it is based merely upon suspicion, you must acquit the defendant.

[Given as modified] *

Refused Covered.

Fricke, Judge.

Defendant's Instruction No. —

You are instructed that in weighing the evidence of wit- [fol. 59] nesses you have the right to consider their intelligence, their appearance on the witness stand, their apparent candor and fairness in giving their testimony, or the want of such candor and fairness, their interest, if any, in the result of the trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the stories they tell, and from these things, together with all the facts and circumstances surrounding the case as disclosed by the testimony, to determine where the truth of the matter lies.

[Given as modified] *

Refused Covered.

Fricke, Judge.

[File endorsement omitted.]

[* Words enclosed in brackets erased in copy.]

[fol. 60] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

VERDICT—Filed November 22, 1944

We, the Jury in the above entitled action, find the Defendant guilty of Murder, a felony, as charged in Count #1 of the information and find it to be Murder of the First Degree.

This 22 day of November, 1944.

Iva B. Dickie, Foreman.

[File endorsement omitted.]

[fol. 61] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

VERDICT—Filed November 22, 1944

We, the Jury in the above entitled action, find the Defendant guilty of Burglary, a felony, as charged in Count #2 of the information and find it to be Burglary of the first degree.

This 23 day of November 1944.

Ivan B. Dickie, Foreman.

[File endorsement omitted.]

[fol. 62] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 24, 1944

Deputy District Attorney S. Ernest Roll and the Defendant with his counsel, Milton B. Safier, present.

Defendant moves orally for a new trial.

The hearing on said motion for new trial and the pronouncing of judgment and sentence are continued to November 27, 1944 at 9:00 A. M.

[fol. 63] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MOTION FOR A NEW TRIAL—Filed November 27, 1944

Comes now the defendant, Admiral Dewey Adamson, and moves for a new trial in the above-entitled case upon the following grounds:

I

The verdict is contrary to the law.

II

The verdict is contrary to the evidence.

III

The evidence is insufficient to sustain the verdict.

IV

The jury received evidence out of court other than that resulting from a view of the premises.

V

The jury separated without leave of Court after retiring to deliberate upon their verdict.

VI

The jury was guilty of misconduct by which a fair consideration of the case was prevented.

[fol. 64]

VII

The verdict was decided by lot.

VIII

The verdict was decided by means other than a fair expression of opinion on the part of all the jurors.

IX

The Court misdirected the jury in matters of law and erred in decisions of questions of law arising during the course of the trial.

X

The Deputy District Attorney prosecuting the case was guilty of prejudicial misconduct during the trial before the jury.

XI

The Court erred in denying defendant's motion for an advised verdict.

XII

New evidence has been discovered material to the defendant which he could not with reasonable diligence have discovered and produced at the trial.

XIII

The Court erred in instructing the jury.

XIV

The Court erred in refusing to give the jury instructions requested by the defendant.

[fol. 65]

XV

The defendant was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated: November 24, 1944.

Morris Lavine and Milton B. Safier, Attorneys for Defendant.

(Endorsed) Received copy of the within Motion this 27 day of Nov., 1944. S. E. Roll, Attorney for P.

[File endorsement omitted.]

[fol. 66] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—November 27, 1944

Deputy District Attorney S. Ernest Roll and the Defendant with his counsel, M. B. Safier, present.

Motion for a new trial is denied as to all counts of the information.

No legal cause appearing why judgment should not be pronounced, the Court pronounces judgment and sentence as to Counts 1, 2, 3, 4 and 5 of the information as follows: Defendant is sentenced to the State Prison for the term prescribed by law as to each count but on Count 1, defendant is to be put to death. Defendant is adjudged to be an habitual criminal.

Defendant is remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Warden of the State Prison of the State [fol. 67] of California at San Quentin.

Sentences as to Counts 3, 4 and 5 are ordered to run consecutively with each other and consecutively with sentence in Case No. 98859 and sentences on Counts 1 and 2 are ordered to run concurrently with each other; concurrently with sentences on Counts 3, 4 and 5 and also concurrently with sentence in case No. 98859. These sentences are entered in Judgment Book No. 57, Pages 121 and 122.

Count 1 of the information is automatically appealed.

[fol. 68] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

Present: Hon. Charles W. Fricke, Judge.

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

ADMIRAL DEWEY ADAMSON

JUDGMENT—November 27, 1944

Whereas the said Admiral Dewey Adamson having been duly found guilty in this Court of the crime of Murder, a felony, as charged in Count 1 of the information, which the Jury found to be Murder of the first degree without recommendation and Defendant having admitted prior convictions of felonies as alleged in the information, to-wit: Burglary and Larceny, a felony, convicted in the Circuit Court of the State of Missouri, Jackson County, upon which judgment was rendered on or about February 3, 1920 and

having admitted that he served a term of imprisonment therefor in the State Prison and Robbery, a felony, convicted in the Circuit Court of the State of Missouri, Jackson County, upon which judgment was rendered on or about June 30, 1927 and having admitted that he served a term of imprisonment therefor in the State Prison [fol. 69] The Court adjudges the Defendant to be an Habitual Criminal.

It is the judgment and sentence of this court for the crime of murder in the first degree, of which you, the said Admiral Dewey Adamson, have been convicted by the verdict of a jury, carrying with it the extreme penalty of the law, that you, the said Admiral Dewey Adamson, be delivered by the Sheriff of Los Angeles County, State of California, to the Warden of the State Prison of the State of California at San Quentin, to be by him executed and put to death by the administration of lethal gas, in the manner provided by the laws of the State of California, and the Sheriff is directed to deliver you, the said Admiral Dewey Adamson, to the said Warden of the State Prison at San Quentin within ten days from this date, to be held by said Warden pending the decision of this case on appeal.

Done in open Court this 27th day of November, 1944.

[fol. 70] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

Present: Hon. Charles W. Fricke, Judge.

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

ADMIRAL DEWEY ADAMSON

JUDGMENT—November 27, 1944

Whereas the said Admiral Dewey Adamson having been duly found guilty in this Court of the crime of Burglary, a felony, as charged in Count 2 of the information, which the Jury found to be Burglary of the first degree and Defendant having admitted prior convictions of felonies as alleged in the information, to-wit: Burglary and Larceny, a felony, convicted in the Circuit Court of the State of Mis-

souri, Jackson County, upon which judgment was rendered on or about February 3, 1920 and having admitted that he served a term of imprisonment therefor in the State Prison and Robbery, a felony, convicted in the Circuit Court of the State of Missouri, Jackson County, upon which judgment was rendered on or about June 30, 1927 and having admitted that he served a term of imprisonment therefor in the State Prison

[fol. 71] It Is Therefore Ordered, Adjudged and Decreed that the said Admiral Dewey Adamson is adjudged to be an Habitual Criminal and that he be punished by imprisonment in the State Prison for the term prescribed by law, which sentence is ordered to run Concurrently with sentences in Case No. 98734, Counts 1, 3, 4 and 5 and Concurrently with sentence in Case No. 98859.

It is further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Warden of the State Prison of the State of California at San Quentin.

Done in open Court this 27th day of November, 1944.

[fol. 72] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

Department 43. Hon. Charles W. Fricke, Judge Presiding

No. 98734

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

v.

ADMIRAL DEWEY ADAMSON, Defendant

COMMITMENT DEATH SENTENCE—November 27, 1944

To the Sheriff of Los Angeles County, and to the Warden of the State Prison of the State of California at San Quentin:

Be It Remembered that on the 14th day of September, 1944, an information was filed against the defendant, Admiral Dewey Adamson, by the District Attorney, charging him with having, on the 24th day of July, 1944, murdered

Stella Blauvelt. That the defendant entered a plea of not guilty to the charge contained in the information, and that the cause came on for trial on the 14th day of November, 1944, before a jury. After hearing the evidence and instructions of the court, the jury retired and returned a verdict on the 22nd day of November, 1944, finding the defendant guilty of the crime of murder, as charged in the information, finding it to be murder of the first degree, and making no recommendation in their verdict as to the matter of penalty. That at the request of the defendant, further proceedings and the passing of judgment and sentence were continued [fol. 73] to and set for the 27th day of November, 1944, at the hour of 9:00 o'clock a. m. That on the 27th day of November, 1944, the defendant, by his counsel, moved for a new trial on all the grounds set forth in the Penal Code. That said motion for a new trial was on the 27th day of November, 1944, denied, whereupon the court pronounced judgment as follows:

"It is the judgment and sentence of this Court for the crime of murder in the first degree, of which you, the said Admiral Dewey Adamson, have been convicted by the verdict of a jury, carrying with it the extreme penalty of the law, that you, the said Admiral Dewey Adamson, be delivered by the Sheriff of Los Angeles County, State of California, to the Warden of the State Prison of the State of California at San Quentin, to be by him executed and put to death by the administration of lethal gas, in the manner provided by the laws of the State of California, and the Sheriff is directed to deliver you, the said Admiral Dewey Adamson, to the said Warden of the State Prison at San Quentin within ten days from this date, to be held by said Warden pending the decision of this case on appeal."

Now, Therefore, this is to command you, the Sheriff of said County of Los Angeles, as provided in said judgment, to take the said Admiral Dewey Adamson to the State Prison of the State of California at San Quentin and deliver him into the custody of the Warden of said State Prison; and this further is to command you, the said Warden of the [fol. 74] said State Prison of the State of California at San Quentin, to hold the said Admiral Dewey Adamson pending the decision of this cause on appeal, and upon the judgment herein becoming final to carry into effect the said judgment of said Court at a time and on a date to be here-

after fixed by order of this Court, within the said State Prison, at which time and place you shall then and there put to death the said Admiral Dewey Adamson by the administration of lethal gas.

In Testimony Whereof, I have hereunto set my hand as Judge of the Superior Court, and caused the seal of said court to be hereto affixed this 27 day of November, 1944.

Chas. W. Fricke, Judge of the Superior Court.

Attest: J. E. Moroney, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by A. W. Moore, Deputy. (Seal.)

[fol. 75] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

NOTICE OF APPEAL

Comes now the defendant above named and gives written notice of appeal from the verdicts, judgments pronounced, and orders denying the motion for a new trial, to the Supreme Court of the State of California.

Dated: November 30, 1944.

Milton B. Safier, Morris Lavine, Attorneys for Defendant.

[fol. 76] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

REQUEST FOR PREPARATION OF RECORD ON APPEAL AND FOR INCLUSION OF ADDITIONAL MATTERS IN CLERK'S AND REPORTER'S TRANSCRIPTS: STATEMENT IN GENERAL OF GROUNDS OF APPEAL—Filed December 1, 1944

Comes now the defendant and appeals to the Supreme Court of the State of California from the verdicts rendered and judgments pronounced and from orders denying motion for new trial, which judgments were pronounced and orders entered on the 27th day of November, 1944, and requests that the clerk's and reporter's transcripts on appeal be

prepared and filed. Appellant states that upon said appeal it will be necessary that the record on appeal in addition to the normal record include the following:

I

That the clerk's transcript on appeal, in addition to the normal record, include the following:

1. All minutes of the court;
2. All minutes showing motion for an advised verdict;
- [fol. 77] 3. All minutes showing motion for a new trial and order denying same;
4. All instructions given and refused, requested both by the People and the defendant and all instructions modified by the Court and given to the jury.
5. All written pleadings.

II

That the reporter's transcript on appeal, in addition to the normal record, include the following:

1. All proceedings had on the motions for an advised verdict;
2. All proceedings had on motion for a new trial, and order denying same;
- 3. All motions, objections, arguments of counsel, and rulings of the Court during the trial of the case;
4. All instructions given to the jury and all instructions refused or modified.
5. All remarks and statements of the Court and of the District Attorney during the trial of the case.
6. All proceedings had at the bench or elsewhere out of hearing of the jury.
7. All proceedings had relative to appointment of fingerprint expert.

III

Defendant states that the foregoing additional record on appeal will be necessary in addition to the normal record [fol. 78] in order to support the following grounds for appeal;

1. The question of the guilt or innocence of the defendant and the degree of offence or offences, if any, or included offence or offences if any.

2. The insufficiency of the evidence to sustain or justify the verdicts;

3. Errors of the Court in sustaining and overruling objections to the admission of evidence.

4. Errors of the Court in denying defendant's motions for an advised verdict.

5. Errors of the Court in denying defendant's motion for new trial.

6. Errors of the Court in giving certain instructions to the jury.

7. Errors of the court in refusing defendant's requested instructions.

8. Misconduct of the Deputy District Attorney trying the case.

Dated: November, 30, 1944.

Milton B. Safier, Morris Lavine, Attorneys for Defendant.

Approved: Fricke, J.

[fol. 79] (Endorsed:) Received copy of the within — this 1st day of December, 1944. Fred N. Howser by James Gibbons, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 81-82] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

Department 43

Hon. CHARLES W. FRICKE, Judge

No. 98734

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ADMIRAL DEWEY ADAMSON, Defendant

Reporter's Transcript

APPEARANCES:

For the People: S. Ernest Roll, Esq., Deputy District Attorney of Los Angeles County;

For the Defendant: Milton B. Safier, Esq.

[fol. 83] Tuesday, November 14, 1944; 11:40 o'clock A. M.

Upon the above date the defendant personally appeared in open court with his counsel, Milton B. Safier, Esq., The People being represented by S. Ernest Roll, Esq., Deputy District Attorney of Los Angeles County, whereupon the following proceedings were had and the following testimony was taken, to-wit:

The Court: Call this case of People vs. Adamson. The clerk may draw a jury.

(Selection of a jury was thereupon commenced and concluded at 10 o'clock a. m. on November 15, 1944.)

The Court: You may swear the jury.

(Jury sworn to try the cause.)

Mr. Roll: May I suggest one alternate, if your Honor please?

The Court: Yes. I think we will draw two alternates.

Mr. Roll: All right.

(Two alternates were thereupon impaneled and duly sworn in the case.)

The Court: In view of the nature of the case, the court will order a daily transcript. The clerk may read the information.

(Information read by the clerk.)

The Court: You may proceed, counsel.
[fol. 84] Mr. Roll: Call Mr. Maurer.

John W. Maurer, called as a witness on behalf of the People, was duly sworn and testified as follows:

* The Clerk: State your full name, please.

A. John W. Maurer.

Direct examination.

By Mr. Roll:

Q. Will you state your full name again, please, sir?

A. John W. Maurer.

Q. Mr. Maurer, what is your business or occupation?

A. I am Police Surveyor.

Q. How long have you been engaged in that work?

A. Fifteen years and over.

Q. You are the gentleman that goes out, at the request of various law-enforcement agencies, to make maps and diagrams of premises, and things of that kind and character?

A. Make surveys and transcribe the survey notes to maps.

Q. Did you have occasion in the case which is now pending here in court to make a diagram of certain premises located at 744 South Catalina Street in the city of Los Angeles?

A. That is right.

Mr. Roll: At this time, if the court please, I have two diagrams here, a large one, which I ask be marked People's [fol. 85] Exhibit 1 for identification, and the smaller one, People's Exhibit 2 for identification.

The Court: They may be so marked.

Mr. Roll: With the permission of the court, I would like to—if we could get some thumb tacks—to put them on the board here.

The Court: Yes.

(Diagrams put on the blackboard.)

Mr. Safier: I will stand back here so I can follow it.

By Mr. Roll:

Q. Now, Mr. Maurer, with reference to this address at 744 South Catalina Street, this diagram was made on the 31st day of October, 1944, is that right?

A. That is right.

Q. With reference to that address there, that is a four-story stucco or brick apartment building, is that not correct?

A. Yes, that is right.

Q. And the location of the diagram that is depicted on People's Exhibit 1 is located on what floor of that apartment?

A. Well, that drawing—the scale of that drawing is one inch equals 2 feet, and that shows the rear two apartments on the fourth floor at 744 South Catalina Street.

Q. And the apartment here at the bottom of the map is known as 410; is that right?

A. That is right.

[fol. 86] Q. And the apartment across the hall is known as 409; is that right?

A. That is right.

Q. Now, with reference to the dark lines, these black lines on the outside, that is the outside wall of the building, is that true?

A. That is right.

Q. With reference to the lines in here, the small lines, those indicate windows; is that correct?

A. That is right.

Q. Roughly, can you tell us the approximate size of this living room here?

A. Yes; it is 14 feet square.

Mr. Roll: Just put that in there, if you will.

(Witness does as requested.)

Q. Also put the distances in, on the inside, of the bathroom, hall, closet, kitchen and dinette there.

(Witness does as requested.)

Q. You have indicated the bathroom is 5 feet 3 inches across?

A. The bathroom is 5.3 feet across.

Q. The bathroom is 5.3 feet across?

A. East and west, and the kitchen is 7.7 feet wide, and, of course, 14 feet long.

Q. And the hallway?

A. The hallway between the kitchen and living room is 2.8 feet.

[fol. 87] Q. Now, without going into too much detail, with reference to this other apartment—

A. That is identical.

Q. That is identical in dimension?

A. Absolutely.

Q. Now, with reference to the door which is shown here of the premises, that enters the apartment, is this the door here indicated by this dark line?

A. That is right. I will indicate that by "D-3", if you wish.

Q. All right. With reference to the kitchen and dinette here, you have indicated over in this corner a stove; is that right?

A. That is right; in the northeast corner of the kitchen is a stove, a gas stove?

Q. What is located over on the other side?

A. Along the west wall of the kitchen, starting from the north partition, there is a garbage—there is a garbage compartment beneath the level of the sink, and above the sink level there is a refrigerator; then, moving in a southerly direction, you come to the drainboard.

[fol. 88] Q. That is down here?

A. Yes, and the sink proper. Then, there is a small kitchenette—there are small cabinets that divide the kitchen from the dinette.

Q. With reference to what you have between these two black areas, that is, 410 and D-4, will you explain what is this area here?

A. Yes. You ascend the stairs—those are the rear stairs to what we call a landing, which would be this rectangular area here; that would be called a landing, stair landing. Then, there is a hall leading to the west, that would be to the rear of the building, to a window that has an exit onto a fire escape which leads on down to the ground; to the west of this landing is a hall—main hall of the apartment build-

ing, and there are two doorways leading into separate apartments.

Q. Now, will you give us the approximate distance across the hall from D-4 to D-3?

A. It is 9 feet.

Q. And I notice going into the apartment which you have designated as 409 you have depicted here a divan?

A. That is right.

Q. It is one of these folding down beds that you pull out and goes back in the closet when it is not in use?

A. Yes. The same type of bed is depicted here in apartment 410, folded in the closet.

[fol. 89] Q. You have also depicted in 409, Mr. Maurer, a divan; is that correct?

A. Yes, a divan in the living room against the north wall, from the windows.

Q. That was the condition of apartment 410 on the day you were out there?

A. That is right.

Q. That is, the 31st of October?

A. Yes.

Q. Now, with reference to this fire escape; as you go down the fire escape what is there on the first floor or ground? Is there a ladder? Can you walk all the way down, or what?

A. That I don't know.

Q. Do you have any measurements there made from her apartment door to apartment 409 or 410, to the nearest door to the next apartment on towards the west?

A. Yes, I made that measurement. It is 31 feet from 409, going along the north side of the hall to apartment 407; 31 feet from door to door, the distance between the doors.

Q. When you say "407" irrespective of the number you took the first door there?

A. Yes.

Q. To get the distance from the first door to 409; is that correct?

[fol. 90] A. The first door west.

Q. It is on the same side as 410 is. Is that door just across the hall from the first one there?

A. That is right, they are the same distance from either 409 or 410 and directly opposite each other in the hall.

Q. Now, you have over here indicated a garbage compartment?

A. That is right.

Q. You have a "D-1" there. What does the "D-1" indicate?

A. That is a door in the landing or hallway itself leading into the garbage compartment from the outside of the apartment or from the hallway.

Mr. Roll: I see Dr. Webb is here. May we put him on and call Mr. Maurer back?

The Court: Yes, you may do so.

[fol. 91] FRANK R. WEBB, called as a witness on behalf of the people, was duly sworn and testified as follows:

The Clerk: State your name, please, Doctor.

A. Frank R. Webb.

Direct examination.

By Mr. Roll:

Q. Your name is Dr. Frank R. Webb?

A. Yes, sir.

Q. You are a physician and surgeon?

A. Yes, sir.

Q. Licensed to practice in the State of California?

A. Yes, sir.

Q. A graduate of a medical school?

A. A graduate of Columbia University, New York City.

Q. What year, Doctor?

A. 1902 from the College of Physicians and Surgeons.

Q. And you served an internship thereafter?

A. I did in Washington, D. C.

Q. After that what type of practice did you engage in?

A. Private practice until 1912 when I came west.

Q. All right, what happened when you came west?

A. I was surgeon for the Pacific Great Eastern in British Columbia until 1915; then after that I came to Los Angeles and was associate professor in the University of Southern California Medical College.

[fol. 92] Q. You have been connected with the County of Los Angeles in an official capacity for how long?

A. I have been associated with the Coroner's office since 1917.

Q. In what capacity, Doctor?

A. As Autopsy Surgeon.

Q. And you have performed several thousand autopsies; is that correct?

A. I have, at least thirty thousand.

Q. How many?

A. Over thirty thousand.

Q. Over thirty thousand. Now, directing your attention to one Stella Blauvelt, did you, Doctor, on the 26th day of July, 1944, perform an autopsy on one Stella Blauvelt?

A. I did.

Q. And do you have a photograph here which shows a fair representation of the person upon whom you performed this autopsy?

A. I have.

Q. May I see it, please (receiving photograph)?

The Court: Mark that 3 for identification.

Mr. Roll: Yes.

Q. This is a fair representation, Doctor?

A. It is.

Q. I am going to show you, Doctor, another picture here which I believe is a police photograph and I will ask it be [fol. 93] marked People's Exhibit 4 for identification.

The Court: 4 for identification.

By Mr. Roll:

Q. Is that a different view of the same individual upon whom you performed the autopsy?

A. It is a different view of the same individual and shows the neck region where the wire was tied three times around the neck.

Mr. Roll: At this time, if the court please, I will offer the two photographs, 3 and 4, into evidence.

The Court: So marked.

By Mr. Roll:

Q. Now, Doctor, will you explain to the court and to the ladies and gentlemen of the jury—I should say ladies and gentleman, what examination you made and also the conclusion you came to as to the cause of death?

A. My examination of Stella Blauvelt was made on the 26th day of July, 1944, at 11:48 a. m., and showed the party

to be a female of the white race, aged sixty-four years, height 4 feet 10½ inches, weight 126 pounds, blue eyes, gray hair and light complexion. Further examination showed that there was a slight contusion over the back of both hands. The left humerus was dislocated at the shoulder. There is extensive ecchymosis around the left eye, over the left side of the face extended upward into the left side front of the head and over the left ear. The skull is thick and is intact. The brain tissue is markedly [fol. 94] injected with some subpia hemorrhage. The larynx appears normal, and there is no signs of bruising. The lips are bruised and have a swollen appearance. The lungs are intensely congested and hemorrhagic in consistency and appearance. The heart is normal for her age. The liver of moderate size is pale drab, homogeneous in structural appearance on cut sections and fibrous in consistency. The gall bladder is filled with calculi; the spleen is fibrous and grayish in color. The kidneys are small, shrunken with granular surface and narrowed cortex. The uterus and ovaries, vagina and rectum are normal. The stomach mucosa is normal. There are three superficial bruised grooves, 3/8ths of an inch across, extending around the upper neck region. An electric extension cord was removed from around the neck. On the left side the groove is slightly excoriated; on the right side the neck was a reddened and bruised appearance. From these findings it was determined that the immediate cause of death was strangulation due to constriction around the neck. Other conditions contusion of the brain due to trauma to the head. [fol. 95] Q. Now, Doctor, with reference to what you say you found around her neck, what was that, please?

A. It appeared to be an electric cord, insulated wire.

Q. And the primary cause of death was strangulation?

A. Strangulation, yes, sir.

Q. Doctor, I believe you testified that you saw her on the 26th of July at what time, please?

A. I saw the body on the 26th day of July at 11:48 a. m.

Q. And, Doctor, could you express an opinion based on your experience as to how long, approximately, at that time Stella Blauvelt had been dead, in hours?

A. The body was in pretty fair condition and she had been dead possibly close to 48 hours.

Q. Now, you mentioned the term "ecchymosis." Will you state to the ladies and gentleman of the jury what you mean by ecchymosis?

The Court: Well, that is with reference to the region of the eye?

Mr. Roll: Yes, your Honor.

The Court: All right, Doctor.

A. I stated there is extensive ecchymosis around the left eye, over the left side of the face extending upward into the left side front of the head and over the left ear. By that I refer to a darkened area due to hemorrhage into the tissues of the skin, in other words, commonly spoken of as a bruise, [fol. 96] but really more extensive than the ordinary superficial bruise.

Q. And have you expressed any opinion as to how a bruise of that type or character might have been caused, Doctor?

A. It is very hard to state the method of causing a bruise like that which is extensive over that side. All that I can state is that either some object hit that head or the head hit some object, and that object was not a sharp or cutting object.

Mr. Safier: I didn't understand you.

A. The object was not a sharp or cutting object.

Mr. Safier: It was not.

A. It was not a cutting object. There was no cut on the skin.

By Mr. Roll:

Q. Doctor, you mentioned something about contusion of the hands, I believe.

A. On the back of the hands.

Q. Could you explain a little more in detail what you observed in reference to that?

A. I stated there that the contusion over the back of the hands,—by that I refer exclusively to the back of the hands and not to the knuckles,—it was over the back of the hands, both hands, that showed contusions.

Mr. Roll: You may cross examine.

[fol. 97] Cross-examination.

By Mr. Safier:

Q. Doctor, your autopsy was made on July 26th at 11:48 a. m.; is that correct?

A. Yes, sir.

Q. Where was that made, Doctor?

A. At the Los Angeles County morgue, Hall of Justice.

Q. And you made that autopsy yourself, did you, Doctor?

A. I did.

Q. Now, you read from a report that you have in your hand, Doctor. Is that a report made out by you or dictated by yourself?

A. That is a report dictated to my secretary at the time of the autopsy right at the operating table.

Q. Dictated by yourself, Doctor?

The Court: Do you use the custom, Doctor, of dictating as you are proceeding, step by step?

A. Yes, sir, step by step.

By Mr. Safier:

Q. Doctor, have you an independent recollection of this particular autopsy or is your testimony solely from the written report that you have in your hand?

A. The recollection that I have particularly was a cord, which was still around the neck, left in place for my observation.

Q. Was that cord around the neck the first time you saw the body, Doctor?

[fol. 98] A. Yes, sir.

Q. Was it removed by yourself?

A. No, I think it was removed by my assistant, Mr. Coad, who was working with me.

Q. At the time of the autopsy?

A. At the time, yes, sir.

Q. Would you mind telling me again, Doctor, what the height of this woman was?

A. Her height was 4 feet 10½ inches, weight 126 pounds.

Q. Doctor, you testified at the preliminary hearing in this case in the Municipal Court, did you not, on September 1, 1944?

A. I don't recall the exact date; I haven't a record of that here, but I did testify, yes, sir.

Q. Doctor, I will ask you to read your testimony on page 47, lines 8, 9 and 10.

(Witness does as requested.)

A. Yes, sir.

Q. Did you so testify?

A. I did.

The Court: Just a minute. Let us follow the regular procedure.

By Mr. Safier:

Q. I will ask you, Doctor, if this question was asked you and whether you gave this answer:

"Q. Will you give us the further results of your examination?

[fol. 99] "A. My examination showed the body to be a female of the white race, age sixty-four years, height 5 feet 10½ inches."

Mr. Safier: Now, the answer, your Honor, is very long, it goes on—

The Court: I appreciate that is the only point you want?

Mr. Safier: That is the only point.

The Court: It is not necessary, in proceeding by way of refreshment or impeachment, to read the entire answer if a part of it satisfies the examiner.

Mr. Safier: I want it understood it is only a part of the answer.

Q. Was that question asked and was that your answer?

A. I read my answer from my report here, which definitely states 4 feet 10½ inches. I do not see how I could have said 5 feet 10 inches, when it is written right here in front of me.

Q. I want to know whether this woman's height was 5 feet or 4 feet.

A. 4 feet, 10½ inches.

Q. Now, you testified, Doctor, that the woman had been dead, in your opinion, close to 48 hours?

A. Yes, sir.

Q. Could it have been longer than that?

A. Well, the indications wouldn't lead you to suspect longer, other than it might have been an hour longer or an [fol. 100] hour or two less. But I couldn't state right to the minute.

Q. It wouldn't vary within an hour or two either way?

A. I wouldn't think so.

Q. Now, I believe you testified, Doctor, there were some bruises on the hands?

A. On the back of the hands.

Q. On the back of the hands?

A. Yes.

Q. Was that on the back of both hands?

A. Yes, sir.

Q. Which part of the hand was it, Doctor?

A. Directly over the back of the hands; not over the knuckles, but over this area of the hand, the back of the hand.

Q. Not over the fingers—not over the back of the fingers?

A. No, sir.

Q. That appeared on both hands, I believe you said?

A. Slight contusions on the back of both hands.

Q. Did they appear to be—strike that.

Mr. Saifer: That is all, Doctor. Thank you very much.

Mr. Roll: May the doctor be excused, your Honor?

The Court: Yes, the doctor may be excused.

(Witness excused.)

The Court: I think we will take our morning recess at this time. During this recess the jury keep in mind the [fol. 101] admonition not to talk about the case or form or express any opinion. During the conduct of the trial the alternates are a part of the jury and go to the jury room with the jury. But after the jury retires for its deliberation, only the original twelve, or who happen to constitute the original twelve, go to the jury room.

(Recess.)

(The following proceedings were had in the absence of the jury:)

Mr. Roll: If the court please, I would like to make a motion at this time, your Honor, in reference to some testimony which will be introduced in this case. Your Honor knows when we tried the other case against this defendant

it involved fingerprint testimony and Mr. Larbaig was called as an expert in that case, and counsel, in commenting to the jury in that case, mentioned the fact that fingerprint experts were expensive. I would like to state Mr. Larbaig will testify in this case, and I would like to make the motion that the court appoint an additional expert to make an examination of the negatives in this case, which will be turned over by Mr. Larbaig to any experts your Honor should appoint, the negatives of the various prints which were taken at 744 South Catalina Street, and also the negative of the enlargement of the rolled print of this defendant.

The Court: Have you any person to suggest, Mr. Safier? [fol. 102] Mr. Safier: No, I haven't, offhand, your Honor. I might make some inquiry during the noon hour.

The Court: We are rather limited on the question of fingerprint men. Those closely available are connected with law-enforcement agencies.

Mr. Roll: The remainder of them are in the Armed Services.

Mr. Safier: Yes, I have a suggestion, your Honor, on second thought. Capt. Allen—I believe he is retired now, but he used to be at one time with the Bureau of Investigation in the Sheriff's office. As a matter of fact, I talked to him and asked if he had an opportunity to look at these prints. Of course, his time has been rather limited.

The Court: Well, I am a member of the Fingerprint Association, and I do not know just—Is there someone here who knows anything about Capt. Allen's experience? Do you know anything about Capt. Allen's experience?

Mr. Billings: I do, your Honor.

Mr. Roll: Mr. Billings—

Mr. Billings: Capt. Allen worked in the Department along about 1922 or 1923.

The Court: You have reference to Chester Allen now?

Mr. Billings: Yes, Chester Allen.

The Court: He has since retired from the Sheriff's Department. He has been a captain for the last nineteen or [fol. 103] twenty years. He hasn't had the experience in fingerprint work that an expert should have. I recognize him now. I know Chet Allen very well. I would hardly want to take a man who has been out of the work as long as that, if we could get somebody who is more up to date on the matter.

Mr. Roll: I am willing to take—

The Court: I do not hesitate to make the statement the advance in fingerprint technique has changed very radically. As a matter of fact, I just found out something the other day with reference to black fingerprint powder that is being used, that was new to me.

Mr. Roll: I appreciate the situation. We are limited if your Honor please, in whom we can select. They do have several fingerprint men in the Sheriff's office. I would prefer having one, if possible, who has not made any examination of the prints.

The Court: I think, unquestionably, we should utilize somebody who has never seen these prints at all.

Mr. Roll: That was my thought.

The Court: Merely submit the questioned prints to him and the fingerprint card to him and then let him form his conclusions and let the chips fall where they may. I think that is the only fair way of doing it.

Mr. Roll: Mr. Billings has—I don't know whether counsel was here in court—has rolled the prints of the defendant [fol. 104] and made a comparison of those prints between the—on the priors, the question of the priors.

The Court: I don't think we should use Mr. Billings, to be very frank with you.

Mr. Roll: I wanted to call your Honor's attention to that situation.

Mr. Safier: I think it should be somebody foreign to the Sheriff's office.

The Court: The Sheriff's office is not connected with this case in any way, as far as I know. This is a police case.

Mr. Safier: Except it is a law-enforcement body.

The Court: I am not going to get any amateur fingerprint man here.

Mr. Safier: No, I do not think it should be an amateur, but I think it should be somebody independent of the prosecution and independent of the defendant.

The Court: If you have anybody who comes anywhere near the qualifications, I will be glad to appoint him. It does not make any difference to me who is appointed.

Mr. Safier: Well, I suggest your Honor wait until this afternoon, and I will make some inquiries.

The Court: All right. Suppose, when we take our recess, we come back here a little bit earlier, come back here at twenty minutes to 2 instead of a quarter to 2, and we will take the matter up at that time.

[fol. 105] Mr. Roll: I might suggest, if your Honor please, in so far as the Sheriff's office is concerned, I understand that Mr. Rogers is head of the Fingerprint Department down there. Is that correct?

Mr. Billings: It is.

Mr. Roll: Harry Rogers. I think he is probably qualified.

The Court: He is qualified. The men that I am intimately acquainted with are not men who are at all closely available. A number of them have gone out, some in the Armed Forces and some of them are tied up with occupations that make it impossible for them to take the matter over. We will leave it until that time and see if Mr. Safier has any suggestion to make. I think the value of the testimony, whichever way it breaks, is definitely increased by getting a person who has not had any connection with the case.

Mr. Roll: That was my thought, your Honor.

The Court: I will say, very frankly, I do not think it makes any difference, because this is not one of these opinion sciences. It is a question of whether he is familiar with the work or not. I think the results upon the same product, of any two men who are fingerprint experts, of necessity must be the same.

Mr. Roll: We will have Mr. Larbaig come back at about twenty minutes to 2 and turn the negatives over.

[fol. 106] The Court: Yes. Can you get those negatives for us, Mr. Larbaig?

Mr. Larbaig: Yes, sir.

Mr. Roll: Then, you come back at twenty minutes to 2. I would like to call Dr. Webb back.

The Court: Yes. The record will show the jury, counsel and defendant present.

Frank R. Webb, recalled:

Direct examination (resumed).

By Mr. Roll:

Q. Dr. Webb, in testimony this morning you referred to the light cord and one of the photographs depicted that light cord. During the recess did you go downstairs and bring up the light cord that you found around the neck?

[fol. 107] A. I did.

Q. Is that the light cord there, Doctor (handing light cord to the witness)?

A. I called it an electric cord. It could be for a radio or for a light, but that is the cord that was around the neck.

Q. And that is the cord which is depicted in the photograph which has been introduced here into evidence?

A. It is.

Mr. Roll: I now offer that cord, if the court please, into evidence as People's exhibit next in order.

The Court: I will mark it for identification at the present time. 5 for identification.

Mr. Roll: You may cross-examine.

Cross-examination.

By Mr. Safier:

Q. Dr. Webb, in making that examination of the deceased did you make an examination of the vagina to determine whether or not there was any evidence of criminal attack?

A. We did make that examination and found no abnormality or evidence of spermatozoa from attack.

Mr. Safier: That is all.

The Court: The doctor may be excused.

Mr. Roll: At this time, if the court please, with the court's permission, I would like to have the jurors view the two pictures which Dr. Webb has identified, to supplement his testimony.

The Court: Yes.

(Photographs handed to the jurors and examined by them.)

Mr. Roll: Thank you, Doctor.

John W. Maurer, recalled:

Direct examination (resumed).

By Mr. Roll:

Q. Mr. Maurer, with reference to—we were discussing this garbage compartment here on People's Exhibit No. 1, and this "D-1" indicating a small door which is hinged over on this side; is that correct?

A. That is right.

Q. And that leads right out into the hallway; is that true?

A. Yes, from the hallway into the garbage compartment.

Q. And in so far as the area that you have indicated as "D-2" is concerned, right here, at the time you were out there on the 31st of October, 1944, at that time there was no actual door there; is that correct?

A. No, the door was not there, but the hinges, part of the hinges, were attached to the compartment.

Q. Now, with reference to People's Exhibit 2, will you explain to the court and ladies and gentleman of the jury what that is and how that ties in with People's Exhibit [fol. 109] No. 1?

A. Yes. This is a—this drawing over here is a detailed drawing of the garbage compartment in the kitchen of apartment No. 410 at 744 South Catalina Street. The scale of this drawing is larger than in the drawing of Exhibit 1, in that it is a scale of one inch equals 6 inches. It is quite a larger scale than in the other drawing. Now, there are three views on this drawing as indicated in Exhibit No. 2, the first drawing. View 1, I shall call it, is a planned view of the garbage compartment in the kitchen of Apartment 410. Now, a planned view is a view whereby the eye is directly above the objects or the compartment as you are looking down, right down, therefore this "D-1" in View 1 is the same as the door in "D-1" in the Exhibit No. 1, showing it swinging out into the public hall of the apartment building. Now, "D-2" is the door indicated by "D-2" in the garbage compartment in Exhibit 1. Now, this also shows part of the drainboard leading to the sink here, looking down. Now, the actual dimensions, the inside dimensions of that garbage compartment are 2 feet 3 inches along the north and south and is 1 foot 9 inches wide or east and west. That is the dimension. Now, the dimension of this door, the width of the door "D-1" is 1 foot 2 inches, the width of it, the opening. The width or opening of "D-2" is 1 foot 7 inches. The doors swing as indicated on View 1 in Exhibit No. 2. Now, [fol. 110] view No. 2 is the front elevation of the garbage compartment. In other words, if we were standing in front of the stove in the kitchen of apartment 410 and looking forward or at the garbage compartment, you would have a view something like the view here as No. 2, showing the elevation or the heights. Now, we have this

opening in the white space here as the opening in "D-2," and the height of the door is 2 feet 6 inches. It also is 1 and 7 inches wide.

Q. Wait a minute. When you say the height of the door, do you mean the height of the door or the height of the opening?

A. The height of the opening in which—which the door goes into, yes.

Q. Go ahead.

A. Now, there is a shelf, horizontal shelf, naturally, in this compartment, and that shelf is 1 foot $3\frac{1}{2}$ inches above the floor level. This shaded portion here on the right indicates the partition, the main partition from the kitchen out into the landing or hallway of the apartment building.

The Court: For the record, that is the gray shaded portion?

A. Yes, this cross section area. In other words, in view 3, it is called the hall elevation. Standing in the hall looking at the wall, you would see the opening in the wall [fol. 111] on the outside of the apartment or in the hallway or landing. This shaded portion here indicates the wall on the outside of the apartment.

The Court: You are now referring to the yellow shaded portion?

A. Yes. And white rectangular section here indicates the opening corresponding to "D-1" on Exhibit No. 1. Now, the width of that door is 1 foot 2 inches, the same as in view No. 1. The height of the door is 2 foot 6 inches, and also shows this same shelf, under view of the shelf, looking out into the hall, the same elevation as in view No. 1, of 1 foot $3\frac{1}{2}$ inches high above the floor level. The dotted cross sectional part here indicates this partition here running back, the garbage compartment separating the kitchen of 410 and the adjacent apartment to the west.

The Court: There is one question that occurs to me, Mr. Maurer, and that is, you refer to the shelf there. Now, is the garbage compartment area both above and below the shelf, or only the area below the shelf?

A. This whole compartment is—this cross section dotted line here—the top of the entire garbage compartment extends up to this line, which is about the same level as the drainboard of the sink. It is a matter of 3 or 4 inches above

the height of the doors. It is just like a box, a rectangular box, being divided upper and lower, by this shelf, as I have [fol. 112] indicated here.

The Court: The upright height, vertical height of the opening is the sum of the height of the lower compartment plus the height of the other compartment?

A. Yes, sir, this distance above to the dotted line.

The Court: I am referring to the size of the opening.

A. The opening on both "D-1" and "D-2" are the same, being 2 feet 6 inches.

The Court: I see.

[fol. 113] A. And the width of the opening into the kitchen or D-2, is 1-foot 7 inches. The opening of D-1 out into the hallway is 1-foot 2 inches. Incidentally, this shelf is loose on the south edge of it; that is, one can lift the shelf up from the stringer that it rests on.

By Mr. Roll:

Q. What do you mean "stringer"?

A. Well, it is just a small board across there that you nail the shelf to.

Q. Now, in so far as this opening is concerned, this merely indicates the space where the door is; this indicates the space where the door is; is that right?

A. That is right.

Q. The area on the inside is depicted by these lines, outside lines right here?

A. You have the actual inside area and dimensions.

Q. Going back to People's Exhibit 1, you indicated here stairs down; and you pointed this way. In other words, here is the fourth floor coming from the third, and this is the top of your stairs?

A. That is the landing here.

Q. If you want to go down, you go down here?

A. Seventeen stairs down.

Q. Now, while you were out there, Mr. Maurer—it is not depicted on that diagram—but did you make some measurement concerning some light sockets in 410, particularly the living room?

[fol. 114] A. I did.

Q. Can you locate those, from your memory?

A. Approximately, as I recall it, it is approximately on the west wall of the living room and between the south wall to the hallway, as indicated here.

Q. Do you recall whether there is one there on the opposite side somewhere?

A. There is also one over on the east wall of the living room, just about in between the two windows, as indicated.

The Court: There is just a little question in my mind. Do you mean for light sockets? In other words, are there plugs in the baseboard where you can plug in a light, or just a place to plug in?

A. They are in the wall.

The Court: They are not the kind of sockets that you screw a light bulb into?

A. No, you plug in.

Mr. Hall: You may cross examine.

Cross-examination.

By Mr. Safier:

Q. You first went to the premises at 744 South Catalina Street on October 31, 1944; is that correct?

A. That is right.

Q. That was the first time you had been on those premises?

A. That is right.

[fol. 115] Q. Now, is that a brick building?

A. It is—yes, I think it is. It is a class-A building.

Q. Is it on a corner or in the middle of the block?

A. It is in the—between blocks, yes, between streets.

Q. That would be on the east or west side of Catalina?

A. It would be on the east side of the street, facing west.

Q. Between what streets?

A. Between Eighth—Seventh and Eighth, I believe. I imagine it would be approximately 100 feet from—north of Eighth Street.

Q. Between Seventh and Eighth, you said?

A. Yes, I think so. I know it is about 100 feet north of Eighth Street.

Q. Is there also an elevator in the building?

A. There is, an automatic-elevator.

Q. Now, the outer walls indicated by the heavy black lines, in the large drawing, are brick—are they brick walls?

A. They are—I think they are. I think it is a brick building.

The Court: At any rate, they are the extreme outside walls of the building?

A. That is right. They are quite a bit thicker than the inside partitions.

[fol. 115]. By Mr. Safier:

Q. This side of the drawing, where the fire escape appears, is the east side of the building, is it not?

A. That is the rear; that is the rear of the building; on the east side, yes.

Q. That would be the east side?

A. Yes.

Q. Now, are these the only two apartments of that building of which you made drawings?

A. That is the only two I was in, yes.

Q. What time of day was it you went out there?

A. In the morning, before noon; about 10:30.

Q. Referring to apartment 410, were people living in there when you were there?

A. 410? Yes, it was occupied.

Q. It was occupied?

A. Yes.

Q. Was 409 occupied?

A. I didn't see anyone there. I understood it was.

Q. It appeared to be occupied?

A. Yes.

Q. 409 also appeared to be occupied?

A. Yes.

Q. Now, how many light sockets did you indicate, just two?

A. Yes, that is the only two I saw. I have the exact location in my initial survey, but that is approximately the [fol. 117] location of them, being 7 or 8 or 10 inches above the floor.

Q. They are along the baseboard, aren't they?

A. They are above the baseboard, I think.

Q. Above the baseboard?

A. Yes.

Q. They are sockets which you plug into?

A. That is right.

Q. Now, there is no bedroom in either apartment 409 or 410, is there?

A. Bedroom?

Q. Bedroom.

A. No, it is a living room where the bed pulls out from the—pulls out from the closet and you let it down, as indicated in apartment 409 there.

Q. Now, referring to the garbage compartment, is it directly under the refrigerator, as it appears on that view 2?

A. Yes. The dividing line is indicated there in view 2. It is an inch or so below the level of the drainboard, and above is the refrigerator, and below is what I call the garbage compartment.

Q. What does this line above the white portion indicate?

A. That indicates the ceiling of the garbage compartment.

The Court: I do not know whether the record shows the line you are indicating. Counsel is pointing to the middle elevation on Exhibit 2, the dotted line slightly below the level of the drainboard. Just for the record, that is all.

[fol. 118] Mr. Safier: Yes.

Q. Now, Mr. Maurer, the yellow portion between the line I have just indicated and the top line, or the white section of view 2 is solid, is it not, that is, it is not open from the inside, it is a solid wall, isn't it?

A. Yes, yes. The shaded part there as you look at it, that is all solid.

Q. And view 2 is the opening of the garbage disposal section into the kitchen?

A. That is right.

Q. And view 3 is the opening of the garbage disposal section into the hall?

A. That is right.

Q. Now, you have indicated that the door to the garbage disposal section leading into the hall is hinged on the—

A. East end.

Q. (Continuing)—east end?

A. That is right, it is.

Q. And the door to the garbage compartment on the inside of the kitchen is hinged on the north end?

A. That is right.

Q. Is that correct?

A. That is right.

Q. Now, were both doors on there at the time you went out to this place on October 31st?

A. No, "D-1" was there; "D-2" had been removed. [fol. 119] However, the hinges as I have indicated in view 2 and view 3 or, rather, view 2, were quite evident.

Q. I see. Now, you indicated that there is a shelf in the garbage compartment?

A. That is right.

Q. I believe you testified it rested on a stringer?

A. A cleat, yes, sir.

Q. On one side?

A. Well, it rested on the cleats on both sides, that is the north end of the compartment and the south end. The south, it was loose from the south cleat, I could raise it up.

Q. Well, I am not sure that I understand exactly what you mean by a cleat.

A. Well, that is a cleat here.

Q. Will you explain just what a cleat is, so we will all understand it?

A. Well, here is the wall, two walls, and you want to put a shelf across there. Well, you can't, it is not good practice, or they don't rather, nail this shelf into the wall itself. They will take a piece of lumber, probably a 1-inch by 2-inch cleat and nail it to the wall and to this cleat they will nail the shelf.

Q. I see.

A. And here on the south of the compartment, south of the garbage compartment, that was loose. In other words, I could raise this up.

[fol. 120] Q. How was it on the other side?

A. It apparently was fastened so I could not raise it up.

Q. You could not raise it up?

A. No, sir.

The Court: By the way, did you make any examination so you could tell us whether or not there were any indications of nail holes on the south end of that shelf?

A. No, sir, I didn't notice that.

The Court: I see.

By Mr. Safier:

Q. Now, when you say you could raise it up, how far could you raise that shelf due to the fact it was fastened on the other side?

A. Well, I could raise it up a couple of inches.

Q. A couple of inches?

A. Yes, sir.

Q. Now, this garbage compartment is—"D-1" and "D-2" is sort of an L-shape, isn't it?

A. Well, right here it is in view No. 1, it gives you a large view of it looking down. You would have this offset in here from the door here to this partition here. That would be an L, a matter of 6 or 8 inches.

The Court: I think it is a rather exaggerated L, isn't it?

A. Sir?

The Court: I think it is rather an exaggerated L.

A. Yes, it is a—

[fol. 121] The Court: I think the shape indicated by the diagram is not what we call an L-shape. An L-shape would be very much misleading in the record.

By Mr. Safier:

Q. Now, does the shelf extend all the way to the door indicated by "D-1" and all the way to the door indicated by "D-2"?

A. It does to "D-2," that is the inside.

Q. Yes.

A. On view 1 I think it would be—it would end with a prolongation on the inside of the—

Q. Wall?

A. Wall. I think, and I am sure that on "D-2" it ends over at the inside of the compartment.

Q. Now, the space below the shelf, that is 1 foot 3½ inches?

A. That is right.

Q. And the shelf—

A. From the floor to the shelf, yes.

Q. And the space above the shelf 2½ feet to the top of the opening?

A. Yes, from the floor up. To find this you would subtract 1 foot 3 inches from 2 feet 6 inches and you would get this dimension here.

Q. Now, can you tell me the width of the shelf, the height of the shelf, or dimensions of the shelf?

A. That is approximately one inch.

[fol. 122] One inch?

A. A plain inch board.

Q. Now, you have indicated, referring to "D-2," that the door did not come—is not fastened at the wall but that there was some space on the wall to the hinge of the door; is that correct?

A. Yes, a matter of about 2 or 3 inches.

Q. That space is about 2 or 3 inches, you say?

A. That is right.

Q. You have also indicated the same space on "D-2" from the point where the door meets the wall to the end of the apartment?

A. That is right.

Q. What is the measurement of that space?

A. It is about the same, 3 inches—I will get the exact scale in a minute. Well, this distance of which you speak here to the north of "D-2" is $3\frac{1}{2}$ inches and the distance to the south is $4\frac{1}{2}$ inches. That is outside measurements.

Q. I see. Do you have the actual measurement of the door space itself?

A. Well, that is 1 foot 7 inches, approximately.

Q. And the part indicated by "D-1" is 1 foot 2 inches?

A. That is right.

Q. That is the actual opening?

A. That is right.

[fol. 123] Q. Now, referring to the door at "D-1": how far out does that door open? How far does it swing?

A. This door?

Q. "D-1."

A. "D-1." Well, "D-1" will swing out at right angles, if necessary, to the wall.

Q. How far will "D-2" swing?

The Court: There wasn't any door there when he looked at it, so it would be pure speculation.

A. There wasn't any door there and there is no obstruction there.

By Mr. Safier:

Q. Now, there were some refrigerator pipes in this garbage compartment, any plumbing or piping in that compartment?

A. I do not recall any. There might have been in the upper, above the shelf. I was mainly interested in the

part below the shelf there. There might have been some in the upper portion here.

Q. Could there have been some plumbing in the lower portion, too?

A. I don't think so.

Q. You are not positive?

A. I do not recall seeing any.

Q. But there might have been some, Mr. Maure?

A. Well, as I say, I do not recall seeing any. I looked in there pretty thoroughly. However, I did not have a [fol. 124] light in there. There might have been some over here along a dark corner that I could not see, but I do not recall seeing any.

Q. But there were some that you do recall in the upper section?

A. No, I did not say that. I did not see any at all. There could have been some in the upper section. I did not give that as close a scrutiny as I did the lower half. There could have been some, as I say, over in this dark corner here that I did not observe.

Q. Now, is the garbage compartment right up flush to the drainboard, right up nearer to the sink?

A. Yes, it is just annexed. There is no gap between the drainboard and the garbage compartment; it adjoins right up against it.

Q. Of course, this living room was furnished, was it not? There was some furniture in there when you were out there?

A. Yes, sir, that is right.

Q. Now, have you the dimensions of the hall from the kitchen to the living room?

A. It is right there. The apartment is 6 feet from outside wall to outside wall.

[fol. 125] Q. Tell me how far it is from the sink portion of the kitchen to the entrance to the living room.

A. 12 feet.

Q. Now, Mr. Maurer, how far is it from the point indicated by D-1 on this large drawing to the next apartment going down the hall in a westerly direction?

A. Well, I will make some calculations here. It is approximately 13 feet from—I will take it center to center—it is approximately $14\frac{1}{2}$ feet from the center of D-1 to D-3, or the door of 410. $14\frac{1}{2}$ feet, and it is 31 feet

from 410 to the next door to the apartment to the west. So I will subtract that. $16\frac{1}{2}$ feet from D-1 to the next door west.

Q. I see. Now, this portion indicated by white, that I am now indicating, which is west of the kitchen of apartment 410, that is one of the rooms of the next apartment, is that right?

A. Yes.

Q. Do you know which room it is?

A. Yes, it is 408. It is directly opposite to 407.

Mr. Safier: I think that is all.

The Court: Anything further from Mr. Maurer?

Mr. Roll: While he is here and has his good measuring instruments, there is an exhibit which I intend to introduce later on—he might give us the outside measurements of that door, if the court please.

[fol. 126] The Court: All right. We will go back to the direct examination for that purpose, however.

Mr. Roll: Yes, your Honor. To identify it for the record, I will offer it as—

The Court: Mark it 6 for identification.

Direct examination (resumed).

By Mr. Roll:

Q. Mr. Maurer, I will ask you to give us the measurements of that door, if you will, please?

A. Do you want with the flange?

Q. Take the inside measurements and then with the flange.

A. 1-foot $7\frac{1}{2}$ inches—the width of it is 1-foot, $7\frac{3}{4}$ inches.

Q. Now, the width with the flange, if you will give us that, please?

A. The over-all width is 1-foot, $8\frac{3}{4}$ inches.

Mr. Roll: May the record show he has marked those on there, too?

The Court: Yes.

The Witness: Now, the height of the door is 2-feet 6 inches.

By Mr. Roll:

Q. Will you give us the height of the door with the flange?

A. With the flange—the flange is $\frac{1}{4}$ -inch. So that would make it 2 feet, $6\frac{1}{4}$ inches.

[fol. 127] Mr. Roll: No further questions. Do you have any questions, counsel?

Mr. Safier: No, I have no further questions.

The Court: Mr. Maurer may be excused.

(Witness excused.)

Mr. Roll: Does your Honor desire to call a new witness or take the noon recess?

The Court: I don't think we would gain very much by barely starting and then picking up all the loose ends when we come back. We will take our recess at this time until 1:45. The jury keep in mind the admonition not to talk about the case or form or express any opinion.

(Whereupon a recess was taken until 1:45 o'clock p. m. of the same day, Wednesday, November 15, 1944.)

[fol. 128] Wednesday, November 15, 1944; 1:40 o'clock P. M.

(The following proceedings were had in the absence of the jury:)

The Court: Take up this preliminary matter in the Adamson case. What have you found out in the interim?

Mr. Safier: During the noon hour, your Honor, I telephoned the office and spoke with Mr. Lavine and I asked him concerning a fingerprint expert. He said he would endeavor to suggest somebody, make some inquiries during the noon hour. I telephoned him a little later during the noon hour and he said he had not heard yet; he was making some inquiries but had not got a report back yet as to who was available. So I have no one to suggest at this time. He did say, however, that we had the rest of the afternoon, and perhaps by tomorrow morning we would be able to suggest somebody. At this time I have no one to suggest. It is rather difficult to locate one.

The Court: Well, I am not at all surprised.

Mr. Roll: If the court please, this is the situation: I do not think this case will take terrifically a long time to

try, and I think they should have the benefit of having the prints to make a study of them as soon as possible.

The Court: I haven't the slightest idea as to where you would get any fingerprint experts outside of the sheriff's office, the District Attorney's office or the Police Department. [fol. 129] ment.

(Discussion off the record.)

The Court: I will tell you what I will do. We will just let the matter ride until the afternoon recess, and if there is not any other suggestion I will do the best I can to try and find somebody that does know the situation. It is not because of the difficulty of identifying fingerprints. I think a person who has had just a very short experience in fingerprint identification could come up here and make the identification. But I think when we put a man on the witness stand especially where the charge is murder, it should be somebody who has had years of experience.

Mr. Safier: Of course, Chester Allen did have a good many years' experience.

The Court: Well, now, if you had said "Chester Allen" when you started, I would have immediately recognized him.

Mr. Safier: I did not remember his first name offhand.

The Court: But his work was largely photographic work in the Department. At that time the fingerprint work in the Sheriff's office was entirely different than it is today. There are many things we have learned in the interim. Things that were considered absolutely impossible those days are perfectly possible now.

Mr. Safier: However, I think, your Honor, that he did some work in comparison. I think he has qualified himself as an expert.

[fol. 130] The Court: That is true. So have I in some matter of the business. But I will be perfectly frank, if I wanted to decide the question of whether two fingerprints were alike, I might look at them and come to a conclusion, but before I acted on it I would have somebody who had some more practical experience look at them. Of course, our California rule as to who is an expert, I think, is wholly unsatisfactory. An expert is a man who knows something more about a subject than a layman.

(The following proceedings were had in the presence of the jury:)

The Court: In the case on trial the record will show the jury, counsel and defendant present. You may proceed.

Mr. Roll: Mrs. Watts.

Mrs. MAUD B. WATTS, called as a witness on behalf of the people, was duly sworn and testified as follows:

The Clerk: What is your name, please?

A. Mrs. Maud B. Watts.

Direct examination.

By Mr. Roll:

Q. Your name is Maud B. Watts?

A. Yes.

Q. Where do you live, Mrs. Watts?

A. 1801 Bentley Avenue, West Los Angeles.

Q. I take it your occupation is that of a housewife?
[fol. 131] A. Yes.

Q. Is there a Mr. Watts?

A. There is, my husband.

Q. Mr. Watts is ill at the present time?

A. Yes, sir.

Q. Confined to the home?

A. Yes.

Q. Did you, Mrs. Watts, know a Mrs. Stella Blauvelt during her lifetime?

A. I have known her for forty-five years.

Q. And about how large a woman was she?

A. She was a very small woman, short, barely 5 feet, small-boned and a very well-preserved woman for her years; she was of a long-lived family.

Q. Now, Mrs. Watts,—

Mr. Safier: I did not get the last.

Mr. Roll: She said, "She was of a long-lived family."

Mr. Safier: I move to strike that as being a voluntary statement, and not responsive.

The Court: I will allow it to remain in the record. It would require another question to bring out the matter, merely showing the degree of acquaintanceship, if it is material.

By Mr. Roll:

Q. Mrs. Watts, did you know where she was living at the time of her death?

A. Yes, 744 South Catalina Street.

[fol. 132] Q. Had you seen her there?

A. Yes.

Q. With reference to the date of the 24th of July, 1944, which date, I believe, was on a Monday, when had you last seen her previous to that time?

A. On Saturday, the 22nd, we were together—

Q. Saturday, the 22nd of July?

A. Yes, all day.

Q. Where did you meet her that day?

A. At Bullock's, up in the tearoom, and we had lunch together, went across the street and saw a Mark Twain picture and then visited afterward.

Q. About what time did you leave her on that day?

A. I left her about 4:30 or a quarter to 5.

Q. Where did you leave her?

A. At the corner of—we went over to Sheetz and had ice cream and I left her at the corner of Seventh and Hill.

Q. In Los Angeles?

A. Yes.

Q. Now, at that time she was in good health?

A. Very good health.

Mr. Safier: Objected to as calling for a conclusion and opinion of the witness.

The Court: Overruled.

By Mr. Roll:

Q. So far as Mrs. Blauvelt was concerned, did you know her husband?

[fol. 133] A. I had met him, yes, in Chicago.

Q. Was he living or was he deceased, if you know?

A. He was deceased.

Q. On this date of the 24th—strike that. On this date of the 22nd of July, the day you say you spent most of the day with her and went to the picture show, did you notice on that day whether or not she was wearing any jewelry?

A. Yes, she was wearing her gold wedding ring and two diamond rings, her engagement ring was a solitaire, and then that was next to her wedding ring, and then on top

of that was a platinum ring with a large solitaire surrounded by diamonds, and she always wore them, never took them off.

Mr. Safer: I move to strike that as being an opinion and conclusion of the witness.

[fol. 134] The Court: I think you will have to reframe the question for that purpose.

Mr. Roll: Yes, your Honor?

Q. Now, with reference to the rings which you have described—

The Court: That latter part "She always wore them" will be stricken, because the witness will have to limit her answer to those occasions she is familiar with. You may ask her whether she saw her on other occasions or not.

Mr. Safer: I want to move to strike the entire answer, if your Honor please, on the grounds it is incompetent, irrelevant and immaterial what jewelry she was wearing on the 22nd.

The Court: I think the question as to what property a person owns under the statutory charge is material. That portion of the motion is denied.

Mr. Roll: The only portion that is stricken out was the answer, "She always wore them"?

The Court: Yes. I think the witness can only testify as to how frequently she saw—how frequently she wore the rings.

By Mr. Roll:

Q. How frequently, Mrs. Watts, would you say you have seen her during the period of the last two or three years?

A. Well, she was out at our home very often—I cannot just tell. And then we would meet down town and have [fol. 135] our visits. We averaged about—always about once a week being together.

Q. And that was over what period of time?

A. Well, the last six years, since we have been in California.

Q. Do you remember any occasion during that last six years—withdraw that. What would you say with reference to the rings that you have described in your previous answer, on the occasions that you saw her approximately

once a week during the last six weeks, was wearing them or wasn't she wearing them?

Mr. Safier: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

By Mr. Roll:

Q. Do you understand my question?

A. Yes.

Q. You may answer.

The Court: You may answer.

A. I only saw her once without the large ring.

By Mr. Roll:

Q. When was that?

A. That was in mid-winter, because it was being repaired.

Q. Now, with reference to the rings, so we may have a little better description of them—

Mr. Safier: Just a moment. I move to strike out "being repaired".

The Court: It may be stricken.

[fol. 136] By Mr. Roll:

Q. With reference to the rings, so we may have a little better description of them, from your previous answer I believe the ones you have testified to were three in number; is that correct?

A. Yes.

Q. And one was a wedding ring?

A. Yes.

Q. That had no mounting or diamond in it?

A. No, in gold.

Q. Gold wedding ring?

A. Yes.

Q. Will you describe the next ring, please?

A. The next ring was a large solitaire, and I judge, by my own ring that I had, that it was about a carat and a half or a carat and a quarter. It was gold underneath, but the setting, the prongs were platinum.

Q. You have some diamonds of your own?

A. Yes.

Q. You describe this stone you call a solitaire as being a diamond?

A. A diamond, a very blue, white, very clear diamond.

Q. That covers two rings. Now, with reference to the third ring?

A. Well, the solitaire in the center, that was all platinum, the whole ring was platinum and had been designed so that it was raised a little, and the center stone was about the [fol. 137] same size as the engagement or the other stone, the single; and then the surrounding stones were not chips; they were whole diamonds, but smaller.

Q. Are you able to tell the court and the members of the jury how many smaller stones there were in this ring that you are now describing?

A. Well, I know there were at least six, perhaps seven.

Q. Now, Mrs. Watts, after the decease of Mrs. Blauvelt was your husband appointed administrator of the estate?

A. Yes.

Q. Did you some time after she was found, I believe, on the 25th of July, go to her apartment, 410, some time after the 25th of July?

A. Yes, at 744—410, the number of the apartment. I was thinking of the street.

Q. Yes.

A. Yes, I went in the presence of Mr. Wiseman and Mr. Brennan.

Q. Two police officers. This gentleman here (indicating) is Mr. Wiseman?

A. Yes.

Q. Do you remember what date that was?

A. I think it was following the Coroner's hearing.

Q. The Coroner's inquest?

A. Yes. That was about—I don't know; about the 30th or along in there. I cannot—

[fol. 138] Q. Just a minute. Probably we can fix that date.

A. We went in the afternoon after lunch.

[fol. 139] Mr. Roll: Counsel has informed me—I have in front of me, if the court please, a copy of the Coroner's inquest, and it says on the face of it that the inquest was held on the 31st day of July, 1944. I take it, from this statement on the Coroner's inquest, that you will stipulate that is the date of the Coroner's inquest?

The Court: It is already indicated by her answer about the 30th of July.

Mr. Roll: Yes, I just wanted to fix it.

Q. The day the inquest was held, some time that day, is that the day you went to the apartment?

A. Yes.

Q. Did you make a search of the apartment?

A. Yes, we did. They thought that perhaps I knew some—

Mr. Safier: No.

Mr. Roll: You cannot relate what somebody thought.

The Witness: Yes, I did.

By Mr. Roll:

Q. Will you just tell the members of the jury and the court what search you made, and if you did find any rings?

Mr. Safier: Just a moment, Mrs. Watts. We object to that as incompetent, irrelevant and immaterial; what happened on the 31st day of July in regard to searching the apartment has no bearing upon any issue in the case.

The Court: Objection overruled. It would go to the [fol. 140] weight but not the admissibility.

By Mr. Roll:

Q. Go ahead.

A. We, with the help of everyone, why, we gave a very thorough search—

Mr. Safier: I move to strike—just a moment. I move to strike—

The Court: Strike out the word "thorough."

Mr. Safier (Continuing):—"very thorough" as being a conclusion.

The Court: That will be stricken out.

By Mr. Roll:

Q. Go ahead.

A. And found no rings.

Q. Had you secured one of her rings from the Coroner's office, either you or your husband?

A. Yes, her wedding ring.

Q. The wedding ring, that is the one without the diamond or stone in it?

A. Yes.

Q. About how long would you say you spent in making a search of the apartment there?

A. Well, I should judge an hour at least.

Q. And, Mrs. Watts, did either you or your husband as a friend of hers, and your husband being later appointed as administrator of the estate, take into your possession some of her personal belongings?

A. Well, only what the Coroner—

[fol. 141] Q. Well, I mean later on you took some of her furniture and some of her little things out of the apartment?

A. Well, her niece—may I say that—her niece came and I helped dismantle the apartment.

Q. Now, from the Coroner did you also get a wrist watch?

A. Yes, a small gold wrist watch and some beads.

Q. Do you have those beads here with you?

A. Yes.

Mr. Roll: May I see those, please? (Receiving envelope.) I would like at this time, if the court please, to have this envelope marked as an exhibit for identification.

The Court: You mean the envelope and contents?

Mr. Roll: Yes, your Honor.

The Court: 7 for identification.

Mr. Roll: You may cross examine.

Cross-examination.

By Mr. Safier:

Q. Mrs. Watts, you reside in West Los Angeles?

A. Yes.

Q. And you have testified you had known Mrs. Blauvelt how long?

A. Very nearly forty-five years.

Q. How long did she live on Catalina Street, at 744 South Catalina Street?

A. Well, that is a little hard for me to say.

The Court: Just your best judgment.

[fol. 142] A. She sold her home and—

Mr. Safier: Your best recollection.

A. Well, I would say four or five years.

Q. Four or five years. How long have you lived in West Los Angeles?

A. I have been there six years.

Q. How far is it from your home in West Los Angeles to 744 South Catalina Street?

A. Well, I could not say. I should judge about 10 miles, perhaps.

Q. Now, have you seen less of Mrs. Blauvelt during the year 1944 than you did in a few years preceding 1944?

A. No.

Q. I understood your testimony to be that you saw her on an average of once a week?

A. Yes, about an average of once a week.

Q. Would that be in her home or at your home?

A. In my home more, because it gave her the—more at my home and downtown we would meet and have lunch. She would shop and I would shop.

Q. Was it generally on a Saturday that you would meet her?

A. No particular day.

Q. Now,—

A. Because of Red Cross work and all those things our days changed.

[fol. 143] Q. All right. When you would go over to see Mrs. Blauvelt at either her house or go downtown, would you drive?

A. No, I took the bus.

Q. Always?

A. Uh-huh.

Q. Now, you testified on July 31st you went to Mrs. Blauvelt's, to the apartment where Mrs. Blauvelt had been living at 744 South Catalina. What apartment number was that?

A. Well, four hundred and—I don't remember the exact number. It was on the fourth floor, the back apartment.

Q. You do not recall the number?

A. It is four hundred and—I could not remember whether it is twelve or fourteen, because I knew the location so well I just did not—

Q. Well, do you remember it was on the north side of the building?

A. The south side back, east and south, the fourth floor.

Q. Now, when you went to that apartment on July 31st of this year, nobody was living there; is that true?

A. What did you say?

Q. I say, When you went to the apartment, at Mrs. Blauvelt's apartment, the apartment she had occupied on July 31st of this year, was anyone living in the apartment at the time?

A. Oh, no, it was sealed.

[fol. 144] Q. It had been unoccupied for several days, had it not?

A. Yes, since the death of the—

Q. Since the death of Mrs. Blauvelt it had not been occupied?

A. Since the death of Mrs. Blauvelt.

Q. But the furniture was in there, was it not?

A. Yes.

Q. The carpets on the floor?

A. Yes.

Q. Now, in your search of the apartment did you look under the carpets?

A. No, I did not. The men did that. I looked through—

Q. Well, who looked under the carpet?

A. (Continuing:) —the more intimate things of a woman.

Q. Mrs. Watts, who looked under the carpet?

A. I could not tell you that. They were all busy, three men.

Q. Did you specifically see anybody look under the carpets?

A. I was working at the desk—

Q. You can answer yes or no: Did you specifically see anybody look under the carpets?

A. No.

Q. Did you look between the pillows of any of the furniture yourself?

A. No, I did not.

[fol. 145] Q. Did you specifically see anybody taking the pillows out of the furniture and looking through them?

A. Yes.

Q. Who did you see doing that?

A. Well, my husband did it and there were some pillows had been disturbed.

Q. Now, did you see anyone beside your husband looking among the pillows in the furniture?

A. Well, the detectives were all busy.

Q. Now, I did not ask you that. I said, did you see anyone else looking among the pillows of the furniture other than your husband?

A. There were only two pillows.

Q. Well, did you see anyone other than your husband looking into any of the furniture between the pillows or under the pillows?

A. And in the desks, yes.

Q. Let's just stay with the pillows first.

A. Yes.

Q. All right. Who besides your husband did you see doing that?

A. Well, Mr. Wiseman and Mr. Brennan.

Q. You saw them both doing that?

A. They moved the pillows.

Q. All right. Now, on which piece of furniture did you see your husband examining any of the pillows?

[fol. 146] A. Which piece of furniture? A large chair and the pillow was not in place, it was down, it had been disturbed.

Q. On which piece of furniture did you see Mr. Wiseman examining among the pillows?

A. I could not tell you. I was working at the desk part of the time.

Q. Well, which piece of furniture did you see Mr. Brennan examining?

A. Well, they all looked at that chair.

Q. Well, isn't it a fact, Mrs. Watts, that you don't know whether Mr. Wiseman or Mr. Brennan looked under any pillows in connection with any of the furniture in the house?

A. The two pillows—there were only two pillows and they were not in place. One pillow was on the floor and the other was just resting in this chair out of place.

Q. Well, is there a davenport in the living room?

A. Yes.

Q. Has that got some cushions on it?

A. I presume so.

Q. Do you know?

A. Yes, I know.

Q. How many cushions has it?

A. Well, I think it had the three across the bottom.

Q. Now, who did you see, if anybody, looking under those cushions?

[fol. 147] Mr. Roll: Just a moment. I don't know whether they are removable or whether they are stationary. Let's find that out first, otherwise I will have to object to it.

Mr. Safier: I withdraw it.

Q. Are they removable cushions?

A. I don't know about those cushions.

Q. Did you see anybody lifting up any cushions from the davenport and looking underneath them?

A. No, I did not.

Q. What other piece of furniture is there in the living room?

A. There was just a straight guest chair, that pull-up chair that was silent, and the upholstering was not a pillow, and then there was a great big lounge chair.

Q. Has that got a cushion on it?

A. Yes.

Q. Is it a removable cushion?

A. Yes.

Q. Who did you see lift up that cushion, if anybody?

Mr. Roll: Just a moment. I am going to object to that on the ground it assumes something not in evidence.

The Court: Just reframe the question.

By Mr. Safier:

Q. Did you see anybody lifting up the cushion on the chair or making an examination underneath it?

A. There was a loose cushion, the bottom was a loose cushion, and then there was a back pillow, but that wasn't [fol. 148] in place.

Q. Well, did you see anybody handling those cushions and examining around them?

A. No.

Q. Now, on July 22nd, on Saturday, which was the last time you saw her alive; is that correct?

A. Yes.

Q. On that day you testified that she was wearing three rings?

A. She was what?

Q. Wearing three rings?

A. Yes.

Q. Now, on which finger was she wearing the large solitaire, as you have described it?

A. They were all—the three were on the third finger of her left hand.

Q. All three rings were on the same finger?

A. Yes.

Q. What time did you separate from Mrs. Blauvelt on July 22nd?

A. About 4:30.

Q. In the afternoon?

A. In the afternoon.

Q. Where?

A. At the corner of Seventh and Hill, right in front of Sheetz.

[fol. 149] Q. Did you say 4, about 4 o'clock?

A. About 4:30.

Q. About 4:30?

A. Yes.

Q. Might it have been later than that?

A. No.

Q. Might it have been earlier?

A. No.

Q. You are positive it was—

A. It is approximately that time.

Q. Well, when you say approximately that time do you mean it would not vary 15 minutes one way or the other?

A. No.

Q. By "No" you mean it would not vary 15 minutes one way or the other; is that correct?

A. Yes.

Q. Was Mrs. Blauvelt wearing beads on that day?

A. Yes. She generally wore beads.

[fol. 150] The Court: Do you mean this particular string of beads or do you mean—you said she generally wore beads?

A. No, wore beads.

The Court: Different kinds?

A. Different kinds, custom beads.

By Mr. Safier:

Q. Did she wear the beads that you brought in here today, that were marked for identification, that you handed to Mr. Roll; were those the beads that she was wearing?

A. That day she had on a shorter strand, but they—

Q. Mrs. Watts, you can answer yes or no.

Mr. Roll: No, let her—

The Court: Let her finish her answer. It may be a qualification of her answer. Go ahead, Mrs. Watts, please.

Mr. Roll: Go ahead.

A. That strand, or the beads I gave, were her favorite beads; she wore them more than any other.

Mr. Safier: I move to strike the answer as not being responsive. My question was if she wore the string of beads that she brought to court.

The Court: She has answered by describing the set of beads which she wore, which I think is responsive. I do not think a question necessarily must be answered yes or no.

Mr. Safier: Then, I did not understand the answer.

Q. Is the string of beads you have brought to court, which have been marked for identification, the beads that [fol. 151] Mrs. Blauvelt wore when you were with her on July 22nd of this year?

A. No, not that day.

Q. I see. When had you seen Mrs. Blauvelt prior to July 22nd?

A. Well, I don't know as I can tell you that.

Mr. Safier: That is all. I have no further questions.

Mr. Roll: That is all. May this lady be excused, if the court please?

The Court: Yes.

Mr. Roll: I think as far as we are concerned, she may be permanently excused. She has something she can take care of tomorrow. She will be on 'phone call if you need her later.

Mr. Safier: Very well.

(Witness excused.)

Mr. Roll: Mrs. Massey.

MRS. EULALIE MASSEY, called as a witness on behalf of the People, was duly sworn and testified as follows: 8

The Clerk: What is your name, please?

A. Mrs. Eulalie Massey.

[fol. 152] Direct examination.

By Mr. Roll:

Q. Your full name, please?

A. Mrs. Eulalie Massey.

Q. Where do you live, Mrs. Massey?

A. 744 South Catalina.

Q. That is here in the City of Los Angeles?

A. City of Los Angeles, yes.

Q. Are you the manager of the apartment house there?

A. Yes, sir.

Q. What is the name of that apartment?

A. Pandora Apartments.

Q. How do you spell that?

A. P-a-n-d-o-r-a.

Q. Are you of French extraction or nationality?

A. Yes.

Q. How long have you been the manager there of the apartment, Mrs. Massey?

A. Going on six years.

Q. Six years?

A. Five years and a few months.

Q. Were you the manager there of the apartments during the month of July, 1944?

A. Yes.

Q. Did you know Mrs. Stella Blauvelt during her lifetime?

A. No, just when she came to the apartment.

[fol. 153] Q. Well, how long ago did she come to the apartment, about?

A. I am not sure, but about three years.

Q. She lived there for about three years?

A. Three years.

Q. Did she live in the same apartment all those three years?

A. No. She had 308, apartment 308; then she went to Chicago, and when she came back she couldn't get that same apartment, so we gave her 410.

Q. You gave her 410?

A. 410.

Q. About how long had she lived in apartment 410, roughly?

A. Well, I suppose over a year.

Q. Over a year?

A. Yes.

Q. Now, with reference to your apartment, Mrs. Massey, that is, the whole apartment there, there are four floors in the apartment, correct?

A. Yes.

Q. And how many separate apartments are there, including the one that you occupy?

A. Do you mean in the whole house?

Q. Yes.

A. Forty.

[fol. 154] Q. Forty?

A. Yes.

Q. How are they divided as to floors?

A. Ten in each apartment—I mean ten apartments on each floor.

Q. We will take the fourth floor. Are those all what you call single apartments?

A. No.

Q. The ones in the back are singles?

A. Yes.

Q. How many singles are there?

A. About eight in each apartment.

Q. You mean eight on each floor?

A. Yes, on each floor. Then, the doubles in front.

Q. The front of the apartment faces on Catalina Street?

A. On Catalina Street.

Q. Those are double apartments?

A. Yes.

Q. When you say a double apartment you mean an apartment that has a bedroom?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, with reference to the month of July, 1944, with reference to maid service there—we will take apartment 410, was there any daily maid service furnished there or not?

[fol. 155] A. No.

Q. What was the situation with reference to any maid service there in apartment 410? Did anyone go in and clean up the apartment?

A. Just once every two weeks.

Q. Once every two weeks, is that right?

A. Yes.

Q. What day of the week, if you know, was service furnished there for apartment 410?

A. I think it was on Wednesday.

Q. Every second Wednesday?

A. Every second Wednesday.

Q. Now, you just tell the ladies and gentleman of the jury and the court where your elevator is located with reference to the premises there.

A. It is located almost in the front of the building.

Q. As you come in from the front of the building, which side is it on? Is it on the left hand side or on the right hand side?

A. If I face north it would be on the right side. If I face south or east, it would be on the left side.

Q. Well, let me ask you this: Your apartment faces. I will put it this way: Is the elevator on the north side or the south side?

A. On the north side.

Q. What type of elevator is it?

[fol. 156] A. What type?

Q. Yes, what kind?

A. What kind? I think it is a Hercules.

Q. It is one of those you operate yourself, an electric elevator?

A. Yes.

Q. Is there a stairway leading up anywhere so you can walk up if you want to?

A. Yes, you got the front stairway and a back stairway of the building.

Q. Where is the front stairway?

A. The front stairway, you take it before you get to the elevator, to the right side.

Q. You can go from the first floor to the fourth floor that way?

A. Yes, sir.

Q. You also have a stairway in the back of the building?

A. The same thing.

Q. With reference to the entrance at the front door, as you enter into the apartment itself, do you have a lobby in there?

A. Yes.

Q. Now, with reference to the door there to the apartment, coming out from the street, is that door kept open or shut in the daytime?

[fol. 157] A. It is always open.

Q. I mean, when I say "open", I mean it is not locked?

A. No, no.

Q. How about nighttime?

A. We close it about 10:30; I mean we lock it.

Q. Your tenants have keys which fit the outside door?

A. Yes, and the back door too.

Q. Now, there is a door in the back downstairs; is there not?

A. Yes.

Q. If you go out the back end of your apartment, there on the first floor, what do you come to, an alley?

A. Yes, an alley.

Q. If you go down that alley to the south, you come to what street? Eighth Street?

A. Eighth Street.

Q. Now, with reference to that back door in the daytime, what is the situation with reference to it?

A. Sometimes it is locked and sometimes it is not locked. But at nighttime we lock it early, between 6 and 7.

Q. Where is your apartment there?

A. In the front part of the building on the first floor.

Q. Do you have a linen closet near there somewhere?

A. Near the elevator.

Q. Near the elevator?

A. Yes, opposite.

[fol. 158] Q. Opposite the elevator?

A. Yes.

Q. Now, directing your attention, Mrs. Massey, to the date of Monday, the 24th of July, 1944, did you have occasion on that day to see Stella Blauvelt?

A. Yes.

Q. About what time would you say that you saw her?

A. I saw her once at 10 o'clock; she was ready to go down—to come downtown, and about 3 to 3:30 she came back.

Q. She came back?

A. And I talked to her.

Q. Now, will you state where you were when she came back?

A. Right opposite the elevator, counting the linens, the laundry and linens, and putting it in the closet, in the linen closet. And I talked to her. I opened the elevator—she had a few packages, so I opened the door of the elevator so she could get in easy. That is the last I saw her.

Q. Where were you at the time she came in?

A. Right in front of the elevator door.

Q. With reference to her attire—I am not going to ask you what color dress or anything of that kind or character she had on, but do you recall the—

A. Well, I can tell you. She was dressed up in blue.

Q. She was dressed what?

[fol. 159] A. In blue. She was dressed, and a coat.

Q. A coat. What kind of coat did she have on?

A. Well, it was something like this, but blue.

Q. That is over her dress?

A. Yes.

Q. Would you describe her dress as being a silk dress, rayon or something like that?

A. No, I could not describe it, but it must have been some kind of silk because I never have seen her with anything else.

Q. What time do you fix that as being?

A. About 3 to 3:30; I did not look at the clock, but it must have been about 3:30.

Q. Now, if I understand the answer you gave, that is the last time you saw her alive?

A. Yes, sir.

Q. And do you have a tenant there by the name of Mrs. Vanderveer?

A. Yes.

Q. Do you know what apartment Mrs. Vanderveer was living in as of that date?

A. Yes.

Q. Which apartment?

A. 108, in the first floor.

Q. I do not want you to relate any conversation that you had with Mrs. Vanderveer, but did you see Mrs. Van-
[fol. 160] derveer sometime on Tuesday, the 25th day of July, 1944?

A. No, except in the evening.

Q. Well, that is what I am getting at, some time in the evening?

A. Yes.

Q. About what time did you see her?

A. It must have been between 7:30 and 8 o'clock.

Q. Don't tell us what the conversation was, but did you have some conversation with her?

A. Yes.

Q. Did she say something to you?

A. She told me——

Q. Oh, no, no, you cannot tell that.

A. Yes, she had.

Q. Then, after talking to her, did you go some place with her?

A. I took the key and I went to Mrs. Blauvelt's apartment with her.

Q. You went to Mrs. Blauvelt's apartment with her?

A. Yes, sir.

Q. Now, do you know whether or not Mrs. Blauvelt subscribed for a newspaper?

A. Yes, she had; she had one.

Q. Do you know whether that was a morning paper she subscribed for or an evening paper?

A. Yes, a morning paper.

[fol. 161] Q. Do you know which paper it was?

A. I am not sure, it is the Times or Examiner.

Q. As you went to Mrs. Blauvelt's apartment there on the evening of the 25th of July, 1944, what did you do?

A. Well, I opened the door. I looked at her bed and I looked all around and I could not see her, so I lit the apartment and I saw her dead right on the floor.

Q. Now, do you recall whether or not on that occasion, either immediately after going into the apartment or coming out, or while you were waiting to go in, did you notice any newspaper there?

A. No.

Q. You are not able to say?

A. Well, I don't remember; it could have been there but I don't remember.

Mr. Roll: All right. I have here a photograph which I will ask be marked People's Exhibit, I believe, 8, your Honor, for identification.

The Court: Yes.

By Mr. Roll:

Q. With reference to the scene which is depicted in People's Exhibit 8, with the exception of the lower portion of the man which is shown in the picture there, is that a fair representation of the scene you observed when you turned the light on in the room?

(Handing photograph to the witness.)

A. Yes, sir, just exactly.

[fol. 162] Q. I am going to direct your attention to this photograph which has been identified by the autopsy surgeon, Dr. Webb. Do you recognize the lady whose picture is shown there as being Stella Blauvelt, a person you knew during her lifetime?

A. I do.

Mr. Roll: Did you get the answer?

(Answer read.)

A. Yes.

The Court: Which numbered photograph is that?

Mr. Roll: I showed her People's Exhibit No. 3, your Honor.

Q. Now, after you got in the room there and turned the light on and saw what you have testified concerning, what was the next thing you did? Don't tell any conversation, but what did you do?

A. I went out right away.

Q. Did you either 'phone the police yourself or call someone there in your apartment to 'phone the police?

A. One lady was in my apartment and she say, "I will call the police for you, Mrs. Massey," because I was a little nervous, and she did.

Q. How long would you say, to the best of your recollection, after you were up there in the room and saw what you testified here, was it until the police arrived there?

A. Well, I don't think it took five minutes. Of course, [fol. 163] it might take two or three minutes to go down, but the minute I called the police, the police was there in no time.

Q. Now, as the manager of the apartment house there had you been in Mrs. Blauvelt's apartment at some time a short time before the date of the 24th of July?

A. I was there on Friday.

Q. On the Friday before?

A. Before, Friday evening.

Q. Friday evening. And was Mrs. Blauvelt there herself?

A. Yes.

Q. And did you spend some time there with her?

A. About an hour.

Q. About an hour. With reference to this apartment that she had rented, in so far as I—I am not going to go into a lot of details with you, but I want you to turn around, if you will, and look at the diagram here. So far as the kitchenette is concerned, and this garbage disposal unit—

The Court: Just back a little, Mr. Roll.

Mr. Roll: Yes, I am sorry.

Q. —which is shown over here in a larger scale, so you know what I am referring to—

A. Yes.

Q. —at the present time, this door is off of there; is that right?

[fol. 164] A. Yes.

Q. With reference to the apartment No. 410, that apartment did have a door—we have that “D-1” here and “D-1” here, and it still does have a door on the outside; is that right?

A. Yes.

Q. And it did have a door on this inside “D-2”; is that right?

A. Yes.

Q. Did you ever give this defendant permission—that is this man over here, Mr. Adamson, seated at the end of the counsel table, permission to enter that apartment house?

A. I have never seen him before—no.

Q. And any entry by him was without your consent and against your will; is that correct? In other words, you did not tell him he could come in there or consent to his coming in?

A. No.

Mr. Roll: You may cross examine.

Cross-examination.

By Mr. Safier:

Q. Mrs. Massey, lots of people went in and out of this Pandora Apartment building without getting any consent from you, didn't they?

A. Uh-uh, no.

[fol. 165] Q. Now, you mean if some tenant had some friend calling on him or on them, that they would have to go and get your permission to enter first?

A. Well, I ask them where are they going and they tell me—unless I don't see them.

Q. Then, is it your testimony that—strike that. How many tenants do you have in this building?

A. Between 60 and 65.

Q. And is it a rule of the house that you have to give permission to everybody that goes in and out of the house?

A. It is not the rule but I watch that.

Q. You mean you stay at the front door all the time and watch who goes in and out?

A. To a certain extent, yes.

Q. How long do you stand by that front door during the day watching?

The Court: Just a minute. She did not say she stood at the front door.

By Mr. Safier:

Q. Well, do you stand at the front door and watch who goes in and out?

A. No, but my apartment is in front.

Q. Your apartment is in front?

A. I open the door and I see everything.

Q. You mean every time you hear the front door open you go and see who is coming?

A. If I do not recognize the steps, yes.

[fol. 166] Q. Now, do you instruct your—oh, strike that. Is it one of the rules of the apartment house that the tenants may not have guests unless such guests first obtain your permission to enter?

A. No, I am not that severe, but I want to know who comes just the same. I want the right kind of people.

Q. Well, do you make any—if somebody should come in the front door that you don't recognize do you ask them where they are going?

A. I ask them what I can do for them so they have to tell me where they want to go.

Q. I see, and if they tell you where they want to go is that sufficient, or do you make some further inquiry to determine who they are?

A. Well, if they look pretty good to me, I can trust them, I let them go, but if it is somebody I don't they take the door and go out.

Mr. Safier: I did not get the last part.

The Witness: If it is somebody that—

The Court: Did you get the answer, Mr. Kennelly?

The Reporter: Yes.

The Court: Just a minute. Will you read the answer, Mr. Kennelly?

(Answer read.)

By Mr. Safier:

Q. The front door is kept unlocked during the daytime, you said?

[fol. 167] A. Yes.

Q. And the back door is kept unlocked until about 6 or 7 in the evening; is that correct?

A. No, later than that, about 9 or 9:30, sometimes 10 o'clock. When some of our tenants ask me to leave it open until 10 o'clock, they are expecting somebody, some company, then I do it because they have no key to come in.

Q. Are you referring now to the front door or the back door?

A. How was that?

Q. Are you referring now to the front door or back door?

A. To the front door. The back door is closed early.

Q. The back door is closed between 6 and 7 in the evening; is that right?

A. Yes, sometimes—

Q. That is, it is locked between 6 and 7 in the evening?

A. Yes, uh-huh.

Q. Now, do various people come into the building and deliver meat?

A. No.

Q. And groceries and things like that to the tenants?

A. No, not during the war.

Mr. Roll: I did not hear you.

Mr. Safier: "Not during the war."

The Witness: They have got to carry their own packages.

By Mr. Safier:

[fol. 168] Q. Does the paper boy come and leave papers?

A. Yes.

Q. Does he go up and down the steps and leave papers wherever he has to leave papers—

A. Sure.

Q. On the different floors?

A. Sure.

Q. Now, are you home every day, Mrs. Massey, or are you away sometimes during the day?

A. Very seldom; in five years I have gone three or four times. I always leave somebody at home.

Q. Now, you had known Mrs. Blauvelt about three years, I think you said?

A. Yes.

Q. When did she move into apartment 410?

A. Well, I don't remember exactly. She went to Chicago and then when she came back—I don't know if it was in September or October—I should have the book here.

Q. You mean October or November, 1943?

A. 1943.

Q. Now, tell me again when was the last time you saw Mrs. Blauvelt alive?

A. On Friday, the week before—the week before she was killed.

Q. On Friday?

A. Yes.

[fol. 169] Q. That was the last time you ever saw her alive?

A. The last time I ever saw her—no, I saw her on Monday at 10 o'clock, on Monday, she was ready to come downtown, and then I saw her at 3 to 3:30. That is when I opened the elevator door for her to come to the apartment, to her apartment.

Q. Now, is Monday, July 24th, between 3 and 3:30 o'clock in the afternoon the last time you saw Mrs. Blauvelt alive?

A. Yes.

Q. Are you certain it was between 3 and 3:30?

A. Yes, I am certain.

Q. Might it have been earlier than 3 o'clock?

A. No.

Q. Might it have been later than 3:30?

A. No.

Q. You are positive?

A. I am positive.

Q. Very well. Where were you at the time you saw her?

A. In front of the elevator door counting the linens.

Q. You were counting the linens?

A. Yes.

Q. Did Mrs. Blauvelt come in the front door or back door?

A. She came in the front door.

Q. I think you said she had some packages in her hands?

A. Yes, very small, little ones that she had.

Q. How many?

[fol. 170] A. Well, I don't count them; two or three.

Q. She had her coat on, you said?

A. Yes.

Q. And hat?

A. Yes.

Q. And shoes?

A. Shoes.

Q. Stockings?

A. Yes.

Q. You are certain of that?

A. How is that?

Q. Are you sure she had stockings on?

A. Yes, she did, but she didn't have them when I found her dead. Somebody got away with those stockings.

Mr. Safier: I move to strike the last part of the answer as not being responsive and a voluntary statement.

The Court: I will strike the latter portion of the answer.

By Mr. Safier:

Q. Then where did Mrs. Blauvelt go?

A. When?

Q. After you saw her come into the building. Did she go some place?

A. No, she took the elevator. I opened the door for her to go to her apartment.

Q. She took the elevator and went up?

A. To the fourth floor.

[fol. 171] Q. That is the last you saw of her?

A. That is the last.

Q. That is the last you saw her alive?

A. Yes.

Q. What day did you say you had maid service on the fourth floor in July of this year?

A. Wednesday.

Q. Are you certain about that?

A. Yes.

Q. Positive about it?

A. Yes.

Q. Every Wednesday?

A. Every other Wednesday.

Q. I see. Now, what time on July 25th was it that Mrs. Vandiveer came to your apartment?

A. Between 7:30 and 8 o'clock.

Q. In the evening?

A. Yes.

Q. On Tuesday?

A. On Tuesday.

Q. You are certain of that time, too?

A. Yes, sir.

[fol. 172] Q. Now, between the time you last saw Mrs. Blauvelt alive—strike that. You had some conversation with Mrs. Vandiveer the day you went up to room 410; is that right?

A. Any conversation? Yes.

Q. Then you went up to her apartment, apartment 410?

A. Yes.

Q. With Mrs. Vandiveer?

A. Yes.

Q. Was the door to apartment 410 locked or unlocked?

A. It was locked.

Q. It was locked?

A. Yes.

Q. Are you certain about it being locked, Mrs. Massey?

A. It was locked.

Q. Do you remember testifying in this matter on September 1, 1944, at the preliminary hearing?

A. I don't remember.

Q. Well, you did testify at the preliminary hearing?

A. Yes, I did.

Q. You remember that, don't you?

A. Sure.

Q. Well, I will ask you to read—

Mr. Roll: What page, counsel; please?

Mr. Safier: 5.

Mr. Roll: Line?

Mr. Safier: 3 to 4.

[fol. 173] Q. I show you a transcript of your testimony, page 5, lines 3 and 4, and ask you to read that question and answer.

(Witness does as requested.)

A. Well, that is—

Q. Just a minute. Have you read this?

A. I just read it now.

Q. I will ask you if this question was asked and whether you gave this answer:

“Q. Was the door unlocked?”

A. Yes.”

Was that question asked you and did you give that answer?

Mr. Roll: Just a moment. I am going to ask counsel to read the next two lines in the transcript.

The Court: All right, you can clear it up on redirect. The word “unlocked” may mean it was not unlocked or somebody locked it.

The Witness: I used a passkey to open it.

Mr. Safier: Do you stipulate that the reporter will testify, Mr. Roll, that that question was asked and that answer given?

Mr. Roll: I will so stipulate providing, counsel; you will stipulate that in the same testimony, at lines 6 and 7 on page 5, there is an additional answer on that subject. And if you will look at page 8, lines 18 to 20, there is a full explanation of it. I will stipulate to that if you will stipulate to this.

Mr. Safier: Yes, I will stipulate to whatever testimony [fol. 174] there is there.

The Court: I presume that stipulation means all the testimony may be read?

Mr. Roll: Yes, your Honor.

The Court: Is that correct, Mr. Safier?

Mr. Safier: Yes, that is correct, your Honor.

Q. Now, was there a newspaper in front of the door at that time?

A. I don't remember.

Q. You don't remember whether you picked up a paper?

A. No, I didn't pick it up.

Q. You didn't pick any paper up; you don't remember whether there was one there or not?

A. No.

Q. Now, was the door locked or was it unlocked?

A. I used a passkey to open it. I don't remember if I tried to open it without the passkey, but I don't think I did.

Q. Did you knock at the door first?

A. Yes.

Q. But you don't remember whether you tried it before you put your key into the lock?

A. I must have tried it.

Q. You are not certain?

A. No, I am not certain.

Q. Did you just look into the room—you did open the [fol. 175] door?

A. Yes.

Q. Did you just look into the room or did you go into the room?

A. First I look in the room; I opened the door about that much (indicating). I was kind of scared and nervous.

Q. I understand that.

A. Then I opened it a little bit more. When I didn't see her—I didn't see anything, I open it altogether and I put the light—I light the lights.

Q. Did you walk into the room?

A. Yes, I walked into the room.

Q. Mrs. Vandiver walked into the room with you—

A. With me.

Q. —or did she remain in the hall?

A. No, she came in with me.

Q. You walked into the room. Did you say you turned the light on?

A. I turned the light on and then I walked into the room.

Q. When you looked into the room what did you see?

A. I saw her laying down on the floor, covered, two pillows over her face, and then that lamp cord. I didn't touch the pillows; I didn't see what it was under—I didn't see if the cord was on her neck, but I saw the cord start to it. I didn't have the courage to look to see whether [fol. 176] it was, how that cord was going in there.

Q. Did you touch anything at all?

A. No.

Q. You did not see any cord around her neck?

A. No, I didn't lift—I didn't touch the pillows; she was covered.

Q. What was she covered with?

A. Two pillows; one on top of the other, and a coat.

Q. Now, which portion of the body did the coat cover?

A. All of her except her feet.

Q. Did it cover her hands?

A. No, I could see one hand this way; I could see the wrist watch there too.

[fol. 177] Q. Which hand was it?

A. I think it was the left.

Q. In what position did you see the left hand?

A. A little bit out.

Q. Straight out from the body like this (indicating)?

A. Yes.

Q. Indicating a position directly horizontal to the body?

A. Yes.

The Court: No, I would say at right angles to the body.

Mr. Safer: Right angles to the body.

Q. Did you see the other hand at all?

A. I think I did, but I got nervous and didn't look so much.

Q. You don't remember seeing the other hand at all?

A. Not so very well, but it seems to me I see it, but not as plain as the other.

The Court: I think we will take our recess at this time. We have gone a little over our recess time. Apparently we cannot finish, anyhow. During this recess, ladies and gentlemen, keep in mind you are not to talk about the case or form or express any opinion. Take our afternoon recess.

(Recess.)

The Court: Give me that full name again.

Mr. Roll: Lieut. Harry Rogers.

The Court: Under the provisions of the Code of Civil [fol. 178] Procedure Harry Rogers, the head of the Fingerprint Department of the Sheriff's Office, is appointed as expert to make the examination of the fingerprints in this case and report the matter to the court, to be available as a witness for either party, under Section 1871 of the Code of Civil Procedure.

Mr. Roll: May counsel and I approach the bench?

The Court: Yes.

(Conference at bench between court and counsel.)

(The jurors returned into the courtroom and resumed their seats in the jury box.)

The Court: The record will show the jury, counsel and defendant present. You may proceed. Mrs. Massey, please.

By Mr. Safier:

Q. Mrs. Massey, I will show you your testimony at the preliminary hearing in this case page 5, lines 10 to 17, and I will ask you to read it to yourself.

(Handing transcript to the witness.)

A. What is it, please?

Q. Lines 10 to 17. Have you now read that to yourself?

A. Yes, sir.

Q. I will ask you if these questions were asked and if you gave these answers:

"Q. Now, will you describe how she was lying there?

"A. Yes.

"Q. Was there anything close to her?

"A. She was lying on the floor with her hands this way (indicating).

[fol. 179] "Q. With her hands outstretched above her head; is that right?

"A. Yes." Were those questions asked and did you give those answers at the preliminary hearing?

A. Well, I might have done it, yes.

Q. Mrs. Massey, how long did you stay in the apartment at that time?

A. Not two minutes.

Q. Did you notice whether anything was disturbed in the apartment?

A. No, nothing was disturbed.

Q. When you went out of the apartment did you close the door or did you leave the door open?

A. I did close the door.

Q. Did Mrs. Vandiveer leave with you?

A. Yes.

The Court: Will counsel step up to the bench here a minute?

(Conference at bench between court and counsel.)

The Court: You may proceed.

Mr. Safier: May I have the last question and answer read back?

(Record read.)

By Mr. Safier:

Q. Now, between the time that you last saw Mrs. Blauvelt alive between 3 and 3:30 on the afternoon of July 24th, and the time you entered her apartment about 7 or 7:30 in the evening of July 25th, had you heard any noise, [fol. 180] commotion or anything in Mrs. Blauvelt's apartment?

A. No.

Q. Were you on the fourth floor of the building at any time after 3:30 on July 24th this year?

A. No, I didn't.

Q. You did not go on the fourth floor on July 24th at all in the afternoon or evening?

A. No.

Q. Did you at any time on July 25th, prior to 7:30 in the evening, go to the fourth floor?

A. I might have, but I don't remember.

Q. You don't remember?

A. No.

Q. Who occupies the apartment on the same side of the building as apartment 410, immediately next to apartment 410?

A. A lady by the name of Miss Nilson.

Q. Miss Nilson?

A. Yes, sir.

Q. How do you spell that?

A. N-i-l-s-o-n.

Q. Does she occupy the apartment—

A. 308.

Q. I am talking about the fourth floor.

A. I mean 408.

Q. Did she occupy 408 on July 24th and July 25th of this year?

[fol. 181] A. Yes.

Q. Did she occupy the apartment alone or some other people live there?

A. No, she is all alone.

Q. Did you see anybody enter or leave Mrs. Blauvelt's apartment between 3 to 3:30 in the afternoon of July 24th?

A. No.

Q. And 7 to 7:30, July 25th?

A. No.

Q. Did you see a strange woman around the building at any time on July 24th or July 25th of this year?

A. No, I didn't.

Q. Between 3 to 3:30 on July 24, 1944, and 7 to 7:30 on July 25, 1944, who, if anyone, did you see go to the fourth floor of the building?

A. Well, the only—you know—they all come at night and go to bed—cook their dinner and go to bed, and then they leave in the morning.

Q. I am just inquiring as to anybody you might have seen.

A. The one I saw is Mrs. May. She came to my apartment in the morning, the 25th.

Q. Mrs. May?

A. May, M-a-y.

Q. What apartment does Mrs. May occupy?

A. 409, opposite Mrs. Blauvelt's apartment.

[fol. 182] Q. I see. Anybody else?

A. I might have seen all of them, but I don't remember now.

Q. You don't remember now?

A. No.

Q. When you entered apartment No. 410 on July 25 about 7 to 7:30 in the evening, did you go into any room other than the living room?

A. No.

Q. I believe you testified that at the time you saw Mrs. Blauvelt's body on the floor you noticed a wrist watch?

A. She had it on.

Q. Did you also notice whether she had on some rings?

A. She didn't have it.

Q. That is, what hand did you see?

A. She didn't have it.

Q. Which hand, now, was it that you noticed?

A. Well, I think it was this one (indicating).

Q. The left hand?

A. When she is—the one I could see most. You know, it was this way (indicating).

Q. Was it the left hand you could see?

A. Yes, that is the one.

Q. You are certain it was the left hand?

A. Yes. The other I could see, too, the other, but not as well as the left one.

[fol. 183] Q. Did you see any beads?

A. They were on the floor.

Q. The beads were on the floor?

A. Yes.

The Court: Before she died which hand did she wear the rings on?

A. To tell you the truth, I never paid no attention.

The Court: I see.

By Mr. Safier:

Q. Did you ever notice Mrs. Blauvelt ever wearing any rings at all?

A. Oh, yes.

Q. What rings did you notice?

A. They must have been diamond rings. I noticed it every time she came to pay me the rent, but I never paid much attention to it.

Q. She paid you the rent once a month, was it?

A. Every month.

Q. How many diamonds, diamond rings, did you see her wearing?

A. I never count.

Q. More than one?

A. I know she had quite a few, but I never count them.

Q. How many did you see her wear when she paid the rent?

A. I couldn't tell you; I never counted them. I know she had quite a few.

Q. Well, did you sometimes see her without any rings on? [fol. 184] A. No.

Q. When she paid the rent?

A. No, she always had.

Q. Did you see a paper boy around the building at any time on July 24 or July 25th?

A. No.

Q. You did not?

A. Well, they do come, yes, it is young fellows about ten or twelve years old.

Q. Or, did you see them around there that day, July 24th or July 25th?

A. They come every day.

Q. Did you see them?

A. Yes.

Q. What day did you see them, July 24th or July 25th?

A. Every day I see them, the 24th and 25th.

Q. You see them every day. What time of the day did you see them on July 24th?

A. Well, they haven't got no regular hours but it is between 4 and 6 o'clock.

Q. When you say "they" do you mean that there is more than one?

A. How?

Q. When you say "they" do you mean that there is more than one?

A. Yes, there is more than one.

[fol. 185] Q. How many are there?

A. There is three in the afternoon and two in the morning.

Q. There are five paper boys come to the building?

A. Three boys.

Q. Three boys?

A. Yes, there is five altogether, two in the morning and three in the afternoon.

Q. There are five altogether?

A. Yes.

Q. How many did you see enter the building on July 24th?

A. The same amount.

Q. Five?

A. Five.

Q. Did you see five enter the building on July 25th?

A. Yes.

Q. Now, do you remember what time of the day you saw any of these newsboys enter the building on July 24th?

A. Well, they come in the afternoon every day.

Q. Well, did they come in the afternoon on that day?

A. Yes.

Q. On July 25th, too?

A. Yes.

Q. Now, after you left Mrs. Blauvelt's apartment on the evening of July 25th where did you go?

A. I went and talked to my help; I went straight to their [fol. 186] apartment.

Q. You went to whose apartment?

A. To Mr. and Mrs. Frick, they work for me and I told them the news.

Q. Well, now, I don't want to know what you told them. I just want to know where you went. Now, at the time you were in apartment 410 the evening of July 25th did you notice whether any of the cushions either on the davenport or the chairs were disturbed?

A. Say that again?

Q. When you went into apartment 410 on July 25th between 7 and 7:30 in the evening did you notice whether any of the cushions either on the davenport or chair were disturbed?

A. The cushions on the davenport they were not disturbed except one extra little one, a throw cushion was on top of her face, and the other cushion from the chair was on top of the other little cushion, so she had two over her face.

Q. She had two on her face?

A. Yes.

Q. Was one on top of the other or were they side by side?

A. One on top of the other.

Q. Did you move the cushions at all?

A. No.

Q. Now, on July 25, 1944, in the evening did you lock the back door yourself?

[fol. 187] A. Sometimes I do it; sometimes just the help.

Q. Well, do you remember whether or not you personally locked the back door?

A. I think they done it.

Q. Wait a minute. On July 24th?

A. We do it every night.

Q. Well, do you remember whether on that particular day you did it?

A. Oh, yes, we locked it.

Q. That does not answer the question, Mrs. Massey, I am sorry.

A. Well, yes.

Q. Do you remember whether you yourself locked the back door?

A. I don't remember whether I did it, but I know we lock it. Sometimes it is my daughter, sometimes it is myself, sometimes it is the help, but I watch and see that the door is locked and if it is locked I don't have to look at it.

Q. Did you check the back door on the evening of July 24th to see whether it was locked?

A. Yes.

Q. What time did you check the door?

A. Well, I don't remember exactly what time.

Q. Approximately?

A. It must have been between 6 and 8 o'clock if I am not mistaken.

[fol. 188] Q. I am talking about the back door. Did you check the back door on July 25th to see whether it was locked?

A. Yes.

Q. Was it locked on both occasions?

A. Yes.

Q. Did you check it about the same time on July 25th as you did on July 24th?

A. More or less: A few minutes more or less.

Q. Let me inquire as to what time in the morning the back door is unlocked.

A. About 6—no.

Q. Is that true every day?

A. No, I think about 7 to 7:30.

Q. About 7 to 7:30 in the morning the back door is unlocked?

A. I think so.

Q. That is every day?

A. Yes.

Q. What time in the morning is the front door of the building unlocked?

A. Well, between 7:30—no, 6:30, I think, until about 9 or 9:30.

Q. Some time between 6:30 and 9:30?

A. 9:30 in the evening. Between 6 in the morning, or 6:30 in the morning until about 9 or 9:30 in the evening.

Q. During that interval the front door is unlocked?

[fol. 189] A. It is unlocked. It is closed but unlocked.

Q. Now, on the afternoon of July 24th—strike that.

Mr. Safier: I think that is all.

Redirect examination.

By Mr. Roll:

Q. Now, counsel read from the transcript—

The Court: I assumed the stipulation was you could simply read that into the record without having to ask the witness.

Mr. Roll: All right, your Honor. (Addressing the witness) Just a minute. I have got some more questions. I would like to read this into the record at this time.

Mr. Safier: Page what?

Mr. Roll: Reading from page 5. Counsel asked with reference to lines 3 and 4. "Q—Was the door unlocked? A—Yes. Q—Did you open the door? A—With a passkey."

Then, on cross examination, at page 8, line 15: "Q—And then when you went into Mrs. Blauvelt's apartment did you open the door to her apartment with a key? A—With a passkey. Q—In other words, the door from the hall leading into her apartment was locked at that time; is that correct? A—Yes, it was locked."

Now, counsel asked you a question with reference to whether anything appeared to be disturbed or not, in the apartment. I am going to show you your testimony on page 6, line 15, and ask you to read that, if you will. You [fol. 190] can read lines—start at 10, and just read it to yourself, down to—

A. To 17?

Q. Yes, you can read to 17. I will catch that in a minute.

(Witness does as requested.)

A. Yes.

Q. Now, I will ask you with reference to whether you observed anything being disturbed—

Mr. Safier: : Just a minute. I am going to object to counsel impeaching his own witness.

Mr. Roll: I am not impeaching my own witness.

The Court: At least, let him finish his question before you object.

By Mr. Roll:

Q. What did you pay particular attention to when you were there in the apartment?

A. The pillows were up over her mouth—over her face, and then I looked to see whether—

Mr. Safier: I cannot hear a word.

A. Nothing was touched.

The Court: Can you talk into that microphone, Mrs. Massey? Then we can hear better.

A. I didn't notice anything disturbed beside the two pillows over her face. One pillow came from the couch and the other from the chair next to her.

By Mr. Roll:

Q. When you got into the room what was the main object [fol. 191] you were looking at?

A. At her.

Q. At her?

A. Yes.

Q. Now, counsel asked you with reference to the apartment which is next door to the apartment that Mrs. Blauvelt occupied, on the same side; what is that number again?

A. 408.

Q. You said it was a Miss or Mrs. Nilson?

A. Miss.

Q. Miss Nilson?

A. Yes.

Q. In so far as she is concerned, do you know whether or not during the month of July, and particularly around the 24th and 25th of July, was she employed at that time?

A. Yes.

Q. Working in the daytime?

A. Working in the daytime.

Q. With reference to the most of the tenants there, with the exception, we will say, of Mrs. May up there on that floor, were those people employed people?

A. All of them except one lady. I think that day she was at the Red Cross.

Q. Now, counsel asked you concerning locking this back door downstairs, that leads out into the alley. I will ask [fol. 192] you with reference to that door, when you lock that door, if you are on the outside in the alley and you want to get in, you cannot come in; is that right?

A. Unless you have a key.

Q. When you are on the inside and you want to go out, you do not have to unlock it, you just turn the door knob, is that right?

A. Yes.

Q. It is one of those catch locks that you can lock it and it locks from the outside?

A. Just pull the door open, yes.

Q. But anyone on the inside who wants to go out can go out?

A. Yes.

Q. Now, I show you here, Mrs. Massey, People's Exhibit 8, and I am going to show you a smaller photograph, which I will ask be marked People's Exhibit 9—

The Court: It may be so marked.

By Mr. Roll:

Q. Do you remember seeing that photograph at the preliminary hearing?

A. I think I did, yes.

Q. Does that fairly represent what you saw there with the exception—

A. Yes.

Q. (Continuing)—of the man's legs in there, when you got in there?

[fol. 193] A. Yes, it is just the same.

Mr. Roll: No further questions.

The Court: Any recross?

Recross-examination.

By Mr. Safier:

Q. Have you told us everything that you observed when you went into Mrs. Blauvelt's apartment?

Mr. Roll: I object to that on the ground—

A. Yes, everything.

Mr. Roll: Just a moment.

The Court: Sustained. Sustained on the ground it is not recross examination. It is already covered on cross examination.

Mr. Safier: No further questions.

Mr. Roll: No further questions.

(Witness excused.)

The Court: We will take our recess at this time until 9:30 tomorrow morning. The jury keep in mind, please, the admonition not to talk about the case or form or express any opinion until the case is finally submitted to you. Take a recess until 9:30 tomorrow morning.

Mr. Roll: Will your Honor be kind enough to ask all witnesses to return tomorrow morning? Do you want Mrs. Massey back, counsel?

Mr. Safier: No.

The Court: She may be excused. The other witnesses [fol. 194] will return here tomorrow morning at 9:30.

(Whereupon an adjournment was taken until Thursday, November 16, 1944, at 9:30 o'clock a. m.)

[fol. 195] Thursday, November 16, 1944; 9:30 o'clock A. M.

The Court: In the case of People vs. Adamson the record will show the jury, counsel and defendant present. I think we had finished with Mrs. Massey, hadn't we, at the end of the day?

Mr. Roll: Yes, your Honor.

The Court: We had finished with Mrs. Massey, that is right.

Mr. Roll: Mr Heck.

FRANK H. HECK, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: What is your name, please?

A. Frank H. Heck.

Direct examination.

By Mr. Roll:

Q. Your name is Frank H. Heck?

A. That is right.

Q. The last name is spelled "H-e-c-k"?

A. H-e-c-k.

Q. Where do you live, Mr. Heck?

A. 744 South Catalina.

Q. About how long, sir, have you lived there?

A. About two years.

[fol. 196] Q. At what apartment number do you live?

A. 308.

Q. Were you living in that apartment on the date of the 24th day of July, 1944?

A. I was.

Q. What is your occupation, sir?

A. Division Plant Supervisor for the Southern California Telephone Company.

Q. How long have you been engaged in that particular occupation, approximately?

A. About a year.

Q. How long have you been with the 'phone company?

A. About twenty-five years.

Q. Now, with reference to apartment 308 there at this address that you are living at, I take it that is on the third floor, sir?

A. It is.

Q. On which side of the building?

A. The south side.

Q. And is your apartment a single or a double?

A. A single.

Q. Where is it with reference, Mr. Heck, to the rear of the building?

A. It is next to the last apartment in the building to the rear.

Q. Next to the last apartment. Now, directing your attention, sir, to the afternoon of the 24th—

The Court: May we get just a little more location on this apartment? Do you know where 408 is?

A. 408 would be directly above me.

The Court: Directly above you?

A. Yes.

The Court: You may proceed.

Mr. Roll: Well, probably we will tie it in a little better with your Honor's question.

Q. Subsequent to the 24th you learned about a lady being found deceased up there in a room; is that correct?

A. I did.

Q. Will you just tell us with reference to that apartment, that is 410, is that not correct?

A. I understood it was in 410.

Q. Your apartment was up on the next floor, you being on the third floor your apartment would be right next door to it; is that right?

A. Yes, sir, that is right.

Q. Were you home on the afternoon of the 24th day of July, 1944?

A. I was.

Q. On vacation or starting vacation?

A. I was starting vacation.

Q. What day of the week was that, do you remember?

A. It was on Monday.

[fol. 198] Q. On a Monday?

A. Monday.

Q. Along in the afternoon about 3 or 3:30 did you hear something unusual?

A. I did.

Q. About what time would you say it was, as nearly as you can fix it?

A. 3:30.

Q. With reference to the door to your apartment, Mr. Heck, at the time you heard this, was the door to your apartment open or closed?

A. It was open.

Q. What portion of your apartment were you in, sir?

A. In the living room, facing the door.

Q. When you say the living room, that is a single apartment?

A. It is.

Q. You have a pull-down bed?

A. That is right.

Q. And also use it as a bedroom?

A. That is right.

[fol. 199] Q. Were you seated or standing?

A. Seated.

Q. How close to the door, approximately?

A. Oh, I should say the full width of the room.

Q. Now, is there a stairway that comes down some place near the rear of your apartment?

A. That is the rear stairway, yes. It is to the right of my door.

Q. Will you tell the court and the members of this jury what this noise was that you heard, what it sounded like to you?

A. I heard a muffled scream and then a thud against the door, and no further noise after that.

Q. From where you were, could you determine from that sound of the scream as to whether it appeared to you to be a man's voice or a woman's voice, or could you tell at all?

A. First of all, the noise that I heard—I was unable to determine the first noise, but whatever it was, it was of such a character that I got up from the chair and walked to the door, and I determined the noise was coming from my right. It was while I was standing in the door that I heard the scream and the thud against the door.

Q. Now, with reference to the scream, could you say whether, from your hearing it, whether it appeared to be a man's voice, a woman's voice, or did you make any determination at all?

[fol: 206] A. I judged it would be a woman's voice.

Q. After what you have told us did you hear any more noise?

A. Not another sound of any kind.

Q. What did you do then?

A. I went back and resumed reading my book.

Mr. Roll: You may cross examine.

Cross-examination.

By Mr. Safier:

Q. Mr. Heck, how do you fix the date as being July 24th?

A. First of all, I verified my company's payroll record; secondly, I verified a charge-out card in the corner drug-store on two books that I had drawn out on the first day of my vacation.

Q. Was July 24th the first day of your vacation?

A. On Monday, yes, sir.

Q. How do you fix the time as being about 3:30 in the afternoon?

A. The noise that I heard and that I determined as being unusual in character, I glanced at a small table clock after I sat down.

Q. Exactly what time was it on that small table clock?

A. 3:30.

Q. Was there anyone else home in your apartment at that time?

[fol. 201] A. No, sir.

Q. You said you had your front door open?

A. That is right.

Q. Do you ordinarily keep your front door open?

A. No, sir. I was smoking a cigar, and as the apartment is rather small I didn't want it to get too stuffy.

Q. Now, when you testified that your apartment is immediately below apartment 408, do you know that to be a fact of your own knowledge or—

A. Yes, I do.

Q. (Continuing)—just surmise that to be so?

A. I know that to be a fact.

Q. Had you ever been up on the fourth floor?

A. Not prior to Monday, the 24th.

Q. Well, after Monday, the 24th, had you been up on the fourth floor?

A. Subsequent to the events on July 25th, yes.

Q. Were you in apartment 408?

A. No, sir.

Q. Where you ever at any time in apartment 408?

A. No, sir.

Q. You simply judged, then, that your apartment is immediately below 408, is that correct?

A. No, sir. I talked to the occupant of 408—

Q. Now, just a minute. Do not relate any conversation that you had.

[fol. 202] Mr. Roll: Wait a minute. Counsel asked the question—he said he simply judged, and I think he is entitled to—

The Court: May we have the question?

(Question read.)

The Court: We will leave the answer as far as it has gone. Let us have another question.

By Mr. Safier:

Q. Now, you testified, I believe, that you were in the living room at the time you heard this scream?

A. That is right.

Q. Did you hear more than one scream?

A. No, sir.

Q. Just one scream?

A. Just one scream.

Q. And then a thud?

A. Yes, sir.

Q. You could not tell at that time where that scream came from, did you?

A. Only from my right.

The Court: When you say—you used that same expression, Mr. Heck, a minute ago, you say from your right. Can you give us any other indication as to what direction—

A. I am facing the north, your Honor.

The Court: I appreciate that. The sound came from your right, you say. From where you are it may have [fol. 203] come from your right and it would still be possible for it to come from above or below.

A. I don't know; I couldn't say.

The Court: In other words, the sound came stronger from the right?

A. Yes.

The Court: That is as far as you can go?

A. Yes, sir.

By Mr. Safier:

Q. Now, as I understand it, you heard the scream and you heard the thud, you thought it was unusual, and then you went back in and sat down to finish your cigar?

A. That is right; that is right.

Q. You made no investigation of any sort?

A. No, sir.

Mr. Safier: That is all.

Mr. Roll: Let me ask just one question, Mr. Heck, so we can get these questions right.

Redirect examination.

By Mr. Roll:

Q. As you got up—if I am incorrect here, your apartment—let myself be the front of the apartment and your—

self the rear of the apartment, and this indicates here an imaginary hallway between us, your apartment would be on my right and your left, is that correct, on this side, it would be on the south side——

[fol. 204] A. Well, I am not facing the——

The Court: I think the question is confusing, Mr. Roll.

Mr. Roll: All right.

Q. Well, when you got up was your right hand toward the rear of the apartment?

A. Yes, sir.

Mr. Roll: No further questions.

Mr. Safier: That is all.

Mr. Roll: That is all. May this witness now be excused?

The Court: Yes.

Mr. Safier: One further question, if I may, your Honor.

Recross examination:

By Mr. Safier:

Q. Mr. Heck, had you been in your apartment all of that day up to 3:30, or had you been out?

A. Prior to 3 o'clock I had visited in the lobby with Mrs. Massey, and about 3 I stepped to the corner drug store and got two books and went back upstairs, so I should say that probably about 10 or 15 minutes after 3 I had started to read the books.

Q. Well, you said some time prior to 3 o'clock you talked to Mrs. Massey. Can you tell me about how much prior to 3 o'clock it was you stopped to talk to her?

A. Only that it was after 12 o'clock, some time between 12 and 3 that I had talked to Mrs. Massey in the lobby.

[fol. 205] Q. Well, that is a period of about three hours, from 12 to 3. Can you fix it a little closer?

A. I could not be sure.

Q. Can you tell me what time elapsed from the time you talked to Mrs. Massey until you heard the scream?

A. No, I could not fix that.

Q. Just where was it you talked to Mrs. Massey, was it on the first floor?

A. On the first floor; in the lobby on the first floor.

Q. What was Mrs. Massey doing at that time?

A. She had come out of her apartment and sat down in the chair opposite me and talked with me.

Q. Could you say whether or not it was before or after 2 o'clock that you talked with Mrs. Massey?

A. I would fix the time somewhere in that period.

Q. Somewhere about 2 o'clock?

A. Somewhere between 12, say, and 2:30, somewhere in there.

Q. That is as close as you can fix it, is it?

A. I think so.

Q. Was Mrs. Massey doing anything with linens at that time?

A. No. She came out of the apartment, her apartment, and I was seated in my chair and she sat down opposite me.

Q. How long did you remain talking to her?

A. Not any longer than about 10 minutes, possibly.

[fol. 206] Q. Then you went out to the drug store?

A. Yes.

Q. And you were gone from the building about how long?

A. Well, not very long; it could not have been over 10 or 15 minutes.

Q. Then when you came back to the building did you go immediately to your apartment?

A. Yes.

Q. How long had you been back in your apartment before you heard the scream?

A. I don't think I had been reading very long, I cannot tell. I became interested in a book.

Q. Well, can you estimate the time you were back in the apartment before you heard the scream?

A. I could not say; I could not say.

Q. Would it be more than 10 or 15 minutes, or a matter of an hour?

A. I don't think it could have been a full hour.

Q. Somewhere between a half and an hour, would you say, Mr. Heck?

A. I would not be sure.

Q. Now, did you pass anybody else as you went out of your apartment on your way to the drug store?

A. I did not leave my apartment to go to the drug store; I left the lobby to go to the drug store.

Q. Well, was there anyone else in the lobby at that [fol. 207] time?

A. No.

Q. Was there anyone else in the lobby when you came back from the drugstore?

A. I saw no one when I came back.

Q. Was Mrs. Massey in the lobby when you came back?

A. I did not see Mrs. Massey in the lobby.

Mr. Safier: That is all.

Mr. Roll: That is all. May this witness now be excused?

The Court: You may be excused.

The Witness: Thank you.

(Witness excused.)

Mr. Roll: Mrs. Vandiver.

MABEL G. VANDIVER, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: What is your name, please?

A. Mabel G. Vandiver.

Direct examination.

By Mr. Roll:

Q. Mrs. Vandiver, will you try to keep your voice up so we can hear you down here, please? Will you do that?

A. I will talk loud.

The Court: Suppose you use the microphone, Mrs. [fol. 208] Vandiver. It is much easier on your voice and you won't have to strain it.

The Witness: I talk loud, anyway.

The Court: You just talk into the microphone if we cannot hear you otherwise.

By Mr. Roll:

Q. Will you state your full name, please?

A. Mabel G. Vandiver.

Q. Where do you live, Mrs. Vandiver?

A. 744 Couth Catalina Street.

Q. About how long have you lived there?

A. It will be three years next May.

Q. In what apartment do you live?

A. 108.

Q. Is that on the first floor?

A. Yes, sir.

Q. Were you living in that apartment on the date of the 24th and the 25th of July, 1944?

A. I was.

Q. Is that a single apartment?

A. Yes, sir.

Q. You occupied it by yourself?

A. Yes, sir.

Q. Did you know a lady by the name of Stella Blauvelt during her lifetime?

A. Yes, sir.

Q. About how long had you known Stella Blauvelt?

[fol. 209] A. At least sixteen years, if not more.

Q. Did you see her during the time you were living at the apartment frequently or infrequently?

A. Very frequently.

Q. Now, with reference to the date of the 24th of July, 1944, which was on a Monday, when would you say it was the last time you saw her alive before that date?

A. On Saturday morning, the 22nd.

Q. On Saturday morning, the 22nd of July?

A. Yes, sir.

Q. Where did you see her on Saturday morning, the 22nd of July?

A. She came to my apartment on her way downtown.

Q. Did she spend any time there with you?

A. At that time?

Q. Yes, ma'am.

A. Oh, she stayed maybe 10 or 15 minutes. She said she was on her way downtown to meet Mrs. Watts and she—

[fol. 210] Q. Don't give us the conversation.

Mr. Safier: I move to strike out the conversation.

The Court: It is part of the res gestae of the transaction. It does not indicate anything particularly with reference to this case. If you want it stricken I will strike it.

Mr. Safier: Yes, your Honor.

The Court: It may be stricken.

By Mr. Roll:

Q. Was that the last occasion that you saw her alive?

A. Yes, sir.

Q. Now, during the weeks, Mrs. Vandiver, since the declaration of war had you and Mrs. Blauvelt been going to the Red Cross?

A. Yes, sir.

Q. What days of the week would you go?

A. Tuesdays and Fridays.

Q. Where did you go?

A. To the Southern California Gas Building.

Q. That is here in downtown Los Angeles?

A. Yes, on Flower Street.

Q. You say you would go together sometimes and sometimes go separately?

A. Well, we always started out separately but as a usual thing we would meet at the car line at Eighth and Catalina and go down together.

[fol. 211] Q. Now, did you, yourself, on Tuesday, the 25th of July, 1944, have occasion to go to the Red Cross?

A. Yes, sir.

Q. And about what time did you return home?

A. Well, generally about 4 o'clock.

Q. Did you see Stella Blauvelt there at the Red Cross that day, on Tuesday, the 25th?

A. No, I did not.

Q. Did you have occasion on the evening of the 25th of July, 1944, to go to Stella Blauvelt's apartment?

A. I did.

Q. And what number did you go to?

A. 410.

Q. Had you been there before?

A. Many times.

Q. About what time would you say it was that you went up there on the evening of the 25th of July, 1944?

A. I would say about 7:30 in the evening.

Q. What did you do, if anything, when you got to the door?

A. Well, I saw her morning "Times" laying at the door, and I thought that was very strange, because she never stayed away at night.

Mr. Safer: Now—

The Court: "Because" and so forth may be stricken.

By Mr. Roll:

[fol. 212] Q. Well, you saw her morning Times; is that right?

A. Yes.

Q. Where was the morning Times with reference to her door?

A. Right in front of the door.

Q. Then, after you saw that and thought what you thought, then what did you do?

A. I went down to Mrs. Massey.

Q. Well, before doing that did you rap on the door or do anything else?

A. I rapped on the door.

Q. You got no answer?

A. No answer.

Q. Then you went where?

A. Down to Mrs. Massey.

Q. Then, about how long elapsed—withdraw that. Did you then come back to 410?

A. I did.

Q. About how long elapsed between the time you were first there until you went down, got Mrs. Massey and came back?

A. Well, I would say half an hour; maybe not that long, because we talked a few minutes, you know.

Q. When you did get back with Mrs. Massey did you observe how she gained entrance to apartment 410?

A. Yes. She knocked on the door and then she used her [fol. 213] pass-key and opened the door.

Q. Were the lights on or off in the apartment at the time she opened the door?

A. They were off.

Q. Were they subsequently turned on by someone?

A. What?

Q. Were they turned on by someone?

A. Yes.

Q. Who turned them on?

A. Mrs. Massey. Just at the left of the door.

Q. Just at the left of the door?

A. Right inside, the ceiling lights.

Q. After the lights were turned on did you look into the room?

A. We did.

Q. Referring to People's Exhibits 8 and 9—here is a smaller photograph and here is an enlargement of the same thing. Now, with reference to what you see there, when you looked into the room, did you see what is depicted there in the picture?

A. I did.

Q. What was your particular attention attracted to, Mrs. Vandiver?

A. Well, naturally, was directed to Mrs. Blauvelt lying on the floor.

Q. Did you at that time notice anything with reference [fol. 214] to the condition of her feet? In other words, was she—withdraw that. Did you notice anything about her feet?

A. Yes, sir.

Q. What did you notice?

A. Well, I noticed that she didn't have any shoes or stockings on. They were out beyond her coat.

Q. Was there a coat over her?

A. Yes.

Q. Do you recall what type or color of coat that was?

A. Well, it was kind of a brown coat, light; kind of a sports coat.

Q. With reference to her head, what if anything did you observe with reference to her head? Could you see her face?

A. No, we couldn't.

Q. Was there something over it?

A. Two large pillows.

Q. Did you observe any light cord?

A. I did.

Q. When I refer to a light cord I mean one that is used on a lamp.

A. Yes.

Q. What did you observe with reference to the lamp cord or light cord?

A. Well, I noticed that her lamp usually sat behind her chair, and behind her end table, and I noticed the lamp was out in front of the table and the cord across the floor under her.

[fol. 215] Q. Did you then go into the room?

A. I did not.

Q. In so far as Mrs. Massey is concerned, I take it, she went in there far enough to turn the light on?

A. Evidently she did.

Q. Now, did you make any other observation there in the room at that time?

A. Well, I noticed her hat on the floor, and I noticed her shoes on the floor, and I noticed her pocketbook lying on a chair right at the door.

Q. You noticed her shoes on the floor?

A. Yes, sir.

Q. Her hat, and her pocketbook lying on a chair?

A. Yes.

Mr. Roll: May, I have the next exhibit number, your Honor?

The Court: The next is 10.

Mr. Roll: I would like to ask that the smaller of these two photographs here, which depicts the chair, be marked People's Exhibit 10 for identification, and an enlargement of the same view marked People's Exhibit 11 for identification.

The Court: They may be so marked.

By Mr. Roll:

Q. I am going to show you these two photographs, People's Exhibits 10 and 11, one being an enlargement of the other; does that fairly depict some of the articles [fol. 216] which you have described, namely, the purse and the shoes at the time you saw them?

A. Yes—well, the shoes—it seemed to me—of course, I was excited—it seemed to me the pocketbook—I didn't notice those things on there. I just noticed the pocketbook lying on the chair.

Mr. Safier: I did not hear that answer.

The Court: Read the answer, Mr. Reporter.

(Answer read.)

The Court: You mean by that, Mrs. Vandiver, you did not notice the other things on the chair, in the picture; you didn't notice them at that time?

A. I don't remember seeing the other things, only the pocketbook.

Mr. Roll: I think she means the reverse of that.

Q. There are other things shown in the photograph you didn't notice; is that what you mean?

A. That is what I mean.

Q. You mentioned her hat lying on the floor.

Mr. Roll: I have here a photograph that I will ask to be marked People's Exhibit—

The Court: 12.

Mr. Roll: —12 for identification.

Q. Mrs. Vandiver, is that a fair representation of the position of the hat—

A. Yes.

[fol. 217] Q. —there on the floor—

A. Yes.

Q. —with reference to the body?

A. Yes.

Q. Did you at that time notice anything with reference to any beads or not?

A. No, I didn't see my beads.

Q. I take it, after that you left; is that correct?

A. Yes.

Q. You left after that?

A. Yes.

Q. Did you go back into the apartment any more at all?

A. Into my apartment?

Q. No, into the one that had been occupied by Mrs. Blauvelt, 410?

A. No, never was in there any more.

Q. Now, Mrs. Vandiver, with reference to Stella Blauvelt, have you seen her wearing some diamond rings?

A. I have.

Q. More than once?

A. All the time.

Q. Do you recall any occasion when you saw her when she was not wearing them?

A. No.

Q. Can you describe those rings to the members of the jury and the court?

[fol. 218] A. Well, I know she wore a plain, old-fashioned gold wedding ring, a solitaire, which was her engagement ring, and then a larger ring that had a diamond and several small ones around it, kind of a high setting in platinum.

Q. Now, directing your attention again to this photograph here, which you previously identified, particularly the large one, People's Exhibit No. 8, which depicts the body of Stella Blauvelt there on the floor, I notice the

picture shows the left hand. Did you pay any attention to that left hand, for the purpose of seeing whether or not there was anything on the hand with reference to jewelry, or a watch, or anything of that character?

A. I saw her watch the first thing.

Q. What would you say, if anything, about the rings? Did you pay enough attention to see whether there were or were not rings?

A. No, I didn't see any; because her hand was turned—turned upward.

Mr. Roll: You may cross examine.

Cross-examination.

By Mr. Safer:

Q. Mrs. Vandiver, what is the number of the apartment that you occupied on July 24th?

A. 108.

Q. And that is on the first floor, is it not?

A. It is.

[fol. 219] Q. Now, will you tell me again when was the last occasion upon which you saw Mrs. Blauvelt alive?

A. The Saturday morning before, the 22nd.

Q. What time of day did you see her at that time?

A. Well, I would say about 10; between 10 and 11.

Q. In the morning?

A. Yes.

Q. What was the occasion of your seeing her at that time?

A. Well, I had not seen her for a day or two as I had had company from Long Beach overnight, and she knew these people and she came up to ask me if one of them had gone home, and I told her yes, and she said, "Well, what kind of a time did you [redacted] and asked me all about it."

Q. Did you have quite a [redacted] visit at that time?

A. Oh, about 10 or 15 minutes; I don't know.

Q. Then Mrs. Blauvelt left, did she?

A. Yes.

Q. And that was the last time you saw her alive?

A. Yes.

Q. Now, how long did you say you had known Mrs. Blauvelt?

A. At least sixteen years.

[fol. 220] Q. How frequently had you seen her in the year 1944 up until the time of her death?

A. Well, it was usually three or four times a week.

Q. Now, on every occasion upon which you saw her had she her rings on?

A. Yes, sir.

Q. Which hand did she wear the rings on?

A. On her left hand.

Q. How many rings were there?

A. Three.

Q. Did she wear them all on the same finger or different fingers?

A. She did.

Q. What?

A. What did you say?

Q. She did what?

A. She wore them all on the same finger. We often commented upon it.

Q. She wore them all on the same finger?

A. Yes.

Q. I believe you testified that on Tuesdays and Fridays you and Mrs. Blauvelt always went to the Red Cross?

A. We did.

Q. Now, had you been in the habit of going there with her or meeting her at the Red Cross?

A. Well, as I said, we never left the apartment together. [fol. 221] Q. You never left the apartment together?

A. No. She came from the fourth floor and I came from the first and we just went over and, as a usual thing, we met at the street car at Eighth and Catalina and took the same car down.

Q. You never waited for her on the first floor until she came by your apartment?

A. No, I did not. She usually was ahead of me.

Q. Now, you did go to the Red Cross yourself on Tuesday, July 25th, did you not?

A. I did.

Q. What time did you return home from the Red Cross?

A. Well, I usually got home about 4 o'clock.

Q. Did you get home at 4 o'clock on that day?

A. Yes. The Red Cross was dismissed at 3:30 and we took the car and came right home.

Q. What time was it that you went up to Mrs. Blauvelt's apartment?

A. I would say about 7:30 Tuesday evening.

Q. When you got to Mrs. Blauvelt's apartment you saw the newspaper in front of the door?

A. I did.

Q. Did you pick up the newspaper or did you leave it there?

A. I did not.

[fol. 222] Q. You did not what?

A. I did not pick it up.

Q. Did you knock at the door at that time?

A. I did.

Q. Did you always try the door to see whether or not it was locked?

A. No, I did not.

Q. You did not try it?

A. I did not hear her radio going, and that is another thing.

Q. Did you see underneath the door whether any lights were burning?

A. No, I didn't see any light.

Q. Then you went down to Mrs. Massey's apartment, is that true?

A. I did.

Q. And you and Mrs. Massey returned to apartment 410 together?

A. We did.

Q. Was the newspaper still in front of the door?

A. It was.

Q. Did either you or Mrs. Massey pick up the paper?

A. We did not.

Q. What did you do when you got back to apartment 410 with Mrs. Massey?

A. Well, I stood at the door in back of her and she [fol. 223] knocked on the door, and no answer, and she put the passkey in and opened the door.

Q. Now, just a minute. Before she put the passkey in and opened the door did she try the door at all to determine whether it was locked or unlocked?

A. No, I don't think so.

Q. When Mrs. Massey opened the door did she open it all the way at first or did she open it just a little bit? How was that?

A. Oh, she just opened it part way and we both naturally looked to see if the bed was down, which it wasn't.

Q. Was it dark or light inside of the apartment when you opened the door?

A. Well, it was dusk with the curtains down.

Q. Were there any lights on in the apartment?

A. No.

Q. Then what was the next thing that happened?

A. What?

Q. What was the next thing that you or Mrs. Massey did?

A. She turned on the wall lights right at the door.

Q. Well, did Mrs. Massey walk into the apartment?

A. She might have stepped just inside of the door to turn the lights.

Q. Did you enter the apartment at all?

A. I did not.

Q. You stayed out in the hall?

[fol. 224] A. Yes.

Q. After the time that Mrs. Massey entered the apartment and put on the light, was the door wide open at that time, or just slightly ajar?

A. Well, you see that chair sat right by the door and it went as far back as the chair, I would say halfway open.

Q. How long did you and Mrs. Massey remain at apartment 410?

A. I would say not more than two minutes. I don't have any idea of the exact time.

Q. Now, did Mrs. Massey at any time go further into the apartment than one or two steps?

A. I don't remember.

Q. But she did go into the room?

A. Well, as I said, she may have stepped just inside to turn on the light.

Q. However, she did turn on the light, didn't she?

A. She did.

Q. Now, when you observed Mrs. Blauvelt on the floor did you see her arms?

A. I did.

Q. Both of them?

A. One seemed to be extended up higher than the other.

Q. What do you mean by "standing up"?

A. Well, I mean higher than the one left, something like this (indicating).

[fol. 225] Q. Could you see both arms at all?

A. Yes.

Q. In what position was the right arm?

A. Extended up like this.

Q. Indicating a bend at the elbow?

A. Yes, I guess you would call it that.

Q. The palm extended toward the head?

A. Yes.

Q. I see. In what position was the left arm?

A. Practically straight out and the palm upturned.

Q. Both arms were visible and were not covered by the coat; is that correct?

A. That is right.

Q. Now, on which wrist did you see the wrist watch?

A. On her left wrist.

Q. On her left wrist. Was the left palm up or was the left palm down?

A. Up.

Q. Is it your testimony that she did not have her rings on at that time or that you did not observe whether or not she had her rings on?

A. I said I did not observe them.

Q. Now, you observed Mrs. Blauvelt's hat. Where did you see the hat?

A. On the floor to the right of her feet.

Q. How about the shoes?

[fol. 226] A. The shoes were over towards the chair.

Q. How about the stockings?

A. I didn't see any stockings.

Q. On the chair you observed her purse?

A. I did.

Q. But you did not observe any packages on the chair; is that correct?

A. No, I did not.

Q. Now, this lamp wire or lamp cord that you saw, where did you see that?

A. Extending from the lamp across the floor under her body.

Q. One end of it was attached to the lamp?

A. I don't remember that; I know the lamp was out in front of her chair and her end table. I just noticed the cord going from the lamp and it struck me because the lamp was out of place.

Q. I see. But are you able to tell us whether or not the lamp was attached to the cord, or, rather, that the cord was attached to the lamp?

A. No, I could not say that.

Q. You could not say whether it was or not?

A. To the lamp?

Q. Yes.

A. No, I could not say.

Q. You did not at any time see Mr. Adamson, the gentleman [fol. 227] man to my right?

A. No, I never have.

Q. At any time on the premises at 744 South Catalina Avenue?

A. No, sir.

Q. Now, had you seen Mrs. Blauvelt at any time on Monday, July 24th?

A. No.

Q. Were you home on July 24th?

A. I was.

Q. All day?

A. Practically.

Q. Had you seen any peddlers in the building on July 24th?

A. Any what?

Q. Peddlers.

A. I don't know whether you would call a solicitor for a newspaper a peddler or not, but one came to my door Tuesday night.

Q. Soliciting newspapers?

A. Los Angeles Examiner.

Q. You say on Tuesday night—

A. Yes.

Q. —or Monday night?

A. Tuesday.

Q. I am referring to Monday, the 24th.

[fol. 228] A. Oh, no, not Monday.

Q. You did not see anybody on Monday?

A. No.

Q. You did not see anybody soliciting for the newspaper on Monday?

A. No.

Q. Now, this boy that came to solicit for the papers, was he a stranger to you?

A. He was.

Q. And you now say that that was on Tuesday?

A. Yes.

Q. Now, you remember testifying in this matter at the preliminary hearing, do you not?

A. I do.

Q. I will ask you to read your testimony on page 14, lines 24 to 26. Will you just read that to yourself?

(Witness does as requested.)

Q. Have you read this, Mrs. Vandiver?

A. Yes.

Q. I will ask you if this question was asked you and if you gave this answer: "Q.—Do you have any peddlers call at the apartment? A—Well, Monday night I had a young boy soliciting for the paper, but that is all." Was that question asked of you and did you give that answer?

A. Evidently I did.

Q. I will also show you your testimony at the preliminary [fol. 229] hearing in this matter, on page 12, lines 8 to 19. Will you read that to yourself, please?

(Witness does as requested.)

Q. Have you read that?

A. Yes.

Q. I will ask you if these questions were asked you and if you made these answers: "Q—Did you see Mrs. Massey open the door?

"A. I did.

"Q. And did you observe anything inside the room?

"A. Yes.

"Q. What did you observe?

"A. I saw Mrs. Blauvelt lying there on her back, with two pillows over her face, covered with a coat, and arms extended, and no shoes or stockings on. Her shoes were in the middle of the floor and her hat on the floor, and I also saw her bag on the chair by the door.

"Q. Did you go into the room?

"A. No, we did not."

Were those questions asked you and did you give those answers?

A. What?

Q. Were those questions I have just read asked you at the preliminary, and did you give the answers that I have just read to the questions?

A. Yes.

[fol. 230] Q. Now, Mrs. Vandiver, when you saw the shoes by the chair,—will you state what that white matter is underneath the shoes?

A. I don't know.

Q. Did you see anything underneath the shoes?

A. No, not at that time I didn't.

Q. Well, the white matter, as it now appears in this picture, as being underneath the shoes, that wasn't there at the time you saw the shoes?

A. No,—when we opened the door I saw a piece of paper about—lying down there by the table—by the chair.

Q. Well, my question—

A. The shoes weren't here.

Q. As I understand it, when you opened the door the shoes were not in the position in which they appear on this picture?

A. I couldn't say that. I didn't notice in which position they were, because I was too nervous. I just noticed the shoes there.

Q. Did you notice them by the chair?

A. Well, close by.

Q. Were they as they appear to be in this picture?

Mr. Roll There is a larger one also, Mr. Safier.

A. Yes, I would say so.

By Mr. Safier:

Q. Well, did you see anything underneath the shoes, between the shoes and the carpet?

[fol. 231] A. No, I didn't. We stood over here. You see, I couldn't see them. I couldn't observe everything in the room.

Q. I will ask you this question: Do you see in this picture, referring to People's Exhibit for identification 11—there is something white that appears to be underneath the shoes, is there not?

A. Yes, in the picture.

Q. I will ask you at the time whether there was anything—any white matter underneath the shoes?

A. I didn't see any.

Q. You didn't see any?

A. No. I would be—they would be this way from me, anyway; I wouldn't know.

Mr. Roll: What was that answer?

(Answer read.)

By Mr. Safier:

Q. Well, you are unable to say at this time, then, whether this white material that now appears in this picture as being underneath the shoes—you are unable to say whether that white material was there at the time you looked at the shoes?

A. I would say that, yes, I didn't see it.

Q. You didn't see it?

A. No.

Q. Would you say it wasn't there?

A. No, I wouldn't say that because I was on the other [fol. 232] side of the room. I wouldn't—I couldn't see it if it was there.

Q. There might have been a pair of stockings by the shoes, underneath the shoes?

A. I don't know. I was away over here (indicating on photograph).

Q. How far was this chair from the door to the apartment through which you made these observations?

A. I don't know. Just right as you went in the door, three or four feet, maybe; I don't know.

Q. From the place where you were standing at the door, looking into the room, how far away from this chair would you judge you were?

A. Well, about as far as—I don't know; about 3 feet, I guess.

Q. About 3 feet?

A. Yes.

Q. And the light was on, wasn't it?

A. Not when we opened the door, no.

Q. Well, it was turned on at some time while you were standing there, was it not?

A. Yes.

Q. Now, can you state whether or not the parcels—

The Court: Just a minute. We have run—I was in hopes we could finish, but we have run away past our recess time. We will take our morning recess at this time. The jury

[fol. 233] keep in mind the admonition not to talk about the case or form or express any opinion. Take our morning recess at this time.

(Recess.)

Mr. Safier: May I have the last question and answer read by the reporter?

(Record read.)

Mr. Safier: Strike that.

Q. Can you state, Mrs. Vandiver, whether or not the parcels that appear in the picture, Exhibit 11 for identification, were on the chair at the time you observed it on July 25th?

A. I said I do not remember that.

Q. You do not remember that?

A. I just remember seeing the bag.

Q. Now, how many cushions did you see on the face of Mrs. Blauvelt when you looked in the apartment, one or two?

A. Two.

Q. Is there a davenport or divan in the living room?

A. There is.

Q. And did you see any cushions missing from the divan?

A. No, I did not.

Q. Did you look at the divan?

A. Well, I guess I glanced around the room, not to that especially.

Q. Now, there is just one part of your testimony at the [fol. 234] preliminary hearing, Mrs. Vandiver, that I forgot to ask you about, and I will be through: Will you start again at page 14, line 24, and read over to page 15 at line 21?

A. 24 to 21?

Q. Yes (handing transcript to the witness). You have read that to yourself now?

A. Yes, sir.

Q. I will ask you if these questions were asked of you and if you gave these answers: "Q. Do you have any peddlers call at the apartment?

"A. On Monday night I had a young boy soliciting for the paper but that is all.

"Q. Soliciting for the newspaper?

"A. Yes, just for new customers.

"Q. What paper was that?

"A. The Examiner.

"Q. The Examiner?

"A. Yes.

"Q. Do you subscribe to any papers?

"A. Yes.

"Q. What paper do you subscribe to?

"A. To the Daily News.

"Q. And did this boy give his name to you?

"A. No, he did not.

"Q. Was he a white boy or colored boy?

"A. He was a white boy.

[fol. 235] "Q. What time did he come to you on Monday night, approximately?

"A. Well, I would say along around 7 or 7:30, something like that.

"Q. Some time after dinner?

"A. Well, I was just getting my dinner. I was late with my dinner."

Were those questions asked and did you give those answers at that time?

A. I did, yes, sir.

Q. Now, did you see any other stranger in or around the building at 744 South Catalina Street on July 24th or July 25th of this year?

A. No, I did not.

Q. Did you at any time, either on July 24th or July 25th of this year, hear any unusual sounds?

A. No, I did not.

Q. In or about the building?

A. No.

Q. At 744 South Catalina Street?

A. No, sir.

Mr. Safier: That is all.

Redirect examination.

By Mr. Roll:

Q. Mrs. Blauvelt, on cross examination—

The Court: Mr. Roll,—

[fol. 236] Mr. Roll: I am sorry, your Honor. I was going to ask a question about her.

Q. Mrs. Vandiver, on cross examination you were asked by counsel with reference to some peddlers coming in the building, and my recollection is that you testified a newspaper boy came on Tuesday night; counsel has read from a transcript of the testimony you gave at the preliminary hearing, which indicates you there testified the boy came on Monday night. What is your best recollection now?

A. It was Monday night. I made a mistake.

Q. You were mistaken?

A. The reason I said that was because I was hurrying to get my dinner to go up to her house.

Q. It was Monday night you saw the boy?

A. It was Monday night I saw the boy. I was wrong.

Mr. Roll: That is all.

Mr. Safier: No further questions.

(Witness excused.)

Mr. Roll: Mr. Pinker.

[fol. 237] RAY H. PINKER, called as a witness on behalf of the people, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. Ray H. Pinker.

Mr. Roll: I wonder, if the court please, if—they have not been introduced. I would like to offer in evidence these photographs here, People's Exhibits 8, 9, 10, 11 and 12.

The Court: They will be marked in evidence.

Mr. Roll: Would it be possible at this time—some of this testimony that Mr. Pinker will give will be concerning some objects in those pictures—would it be possible to show them to the jury before we start?

The Court: Yes. I was just wondering about 5 and 6 also. No, those are not photographs.

[fol. 238] Mr. Safier: May the record show an objection, your Honor, to the reception in evidence of the pictures on the ground no proper foundation has been laid?

The Court: The objection will be overruled.

(Photographs above referred to examined by the jurors.)

Direct examination.

By Mr. Roll:

Q. Your full name is Ray H. Pinker?

A. Yes.

Q. What is your business or occupation, Mr. Pinker?

A. Technical Director of the Scientific Crime Investigation Laboratory, Los Angeles Police Department.

Q. Were you so engaged in that particular occupation on the date of the 25th of July, 1944?

A. I was.

Q. Did you have occasion on that date to go to an address located on South Catalina Street?

A. I did.

Q. An apartment house there?

A. I did. An apartment house, I believe, in the 700 block on South Catalina.

Q. And did you go to apartment 410?

A. I did.

Q. About what time did you arrive there, Mr. Pinker?

A. To the best of my recollection, it was in the early part of the evening.

[fol. 239] Q. Were there some officers there at the time?

A. There were.

Q. Now, I am going to show you here three photographs—

The Court: May I just ask one question: What date was this?

Mr. Roll: The 25th, your Honor.

Q. That is the correct date, the 25th of July?

A. Yes, sir, that is my recollection.

Q. I am going to show you here the three photographs which have just been exhibited to the jury, People's Exhibit No. 11, People's Exhibit No. 8 and People's Exhibit No. 12 and ask you to look at those photographs and state to the court and to the members of the jury whether these photographs fairly depict the scene that you saw when you arrived there (handing photographs to witness)?

A. They do. They are true photographic representations of the various effects in the room of apartment 410.

Q. Now, Mr. Pinker, were you there when the body of Stella Blauvelt was removed?

A. I was, yes.

Q. And the body was removed by someone from the Coroner's office?

A. Yes, it was first rolled over and then removed by the Coroner's deputies.

Q. You were right there at the time?

A. I was present, yes.

[fol. 240] Mr. Roll: I have here a piece of silk stocking, if the court please, which I will ask be marked People's Exhibit 13 for identification.

The Court: People's 13.

By Mr. Roll:

Q. Directing your attention to People's Exhibit 13 for identification, Mr. Pinker, I will ask you to examine that and state whether or not you have seen that before?

A. I have.

Q. When and where did you first see that?

A. I first saw this on the evening of the 25th day of July, 1944, at the time the Coroner's deputies rolled the body of Mrs. Blauvelt over this foot, torn foot of a silken stocking was underneath the body lying on the floor.

Q. Now, directing your attention to—I have here a handkerchief, if the court please—

The Court: 14.

Mr. Roll: 14, apparently green and white, with little green stripes in it.

Q. Directing your attention to People's Exhibit 14, Mr. Pinker, I will ask you to examine that and state whether or not you have seen that before?

A. I have.

Q. When and where did you first see this?

A. I first saw this on the evening of the 25th day of July, 1944, in apartment 410. It was lying on a large over-[fol. 241] stuffed chair which is illustrated in Exhibit 11. This handkerchief can be seen lying directly behind an open woman's purse.

Q. Will you be kind enough to step down with your pencil so the jury can see what you refer to?

A. (Indicating to jurors:) With my pencil I am pointing to this handkerchief as shown in the photograph.

Mr. Roll: I now offer into evidence, if the court please, People's Exhibit 13, the half silk stocking and the handkerchief which have been identified.

The Court: So marked.

By Mr Roll:

Q. Now, directing your attention, Mr. Pinker, to the orange colored handkerchief, or brown, anyway, I will ask it be marked People's Exhibit 15 for identification. I will ask you to examine that and state whether or not you have seen that before?

A. I have.

Q. Where did you first see that?

A. I first saw this in a drawer in a dressing alcove in apartment 410. I found upon my examination of the bloody handkerchief—

Q. People's 13?

A. People's 13, the name "Carey" on it. I then searched through dresser drawers and discovered this other handkerchief also with the name "Carey" on it, so I brought it with me as a sample of the type of handkerchief present in [fol. 242] that apartment.

Mr. Safer: I move to strike the "bloody", your Honor. There isn't any evidence that there is blood on the handkerchief.

The Court: Well, we will strike that reference out as to Exhibit 14 for the time being.

Mr. Roll: With reference to People's Exhibit 15 I now offer that into evidence, if the court please, that is the other handkerchief here.

The Court: It may be so marked.

By Mr. Roll:

Q. Now, Mr. Pinker, with reference to the substance which appears there on People's Exhibit No. 13, that is the handkerchief—

The Court: 14.

Mr. Roll: 14, your Honor? That is correct, 14, the handkerchief, the green and white one:

Q. Are you a forensic chemist?

A. Yes, I am.

[fol. 243] Q. Graduate of the University of Southern California?

A. I am.

Q. Engaged in that profession for some period of time; is that correct?

A. For the past seventeen years.

Q. You have made examinations of blood, have you?

A. On numerous occasions.

Q. From your observation of that handkerchief there at the scene, can you state to the court and the members of the jury as to what that substance appears to be?

A. It appeared—

Mr. Safer: Just a minute. I object to that as no proper foundation laid, that he made any examination.

The Court: Well, as far as that is concerned, any person could state what something appears to be. That is opinion evidence. Did you make any further examination other than a visual examination, Mr. Pinker?

A. No, I did not, your Honor. I did not make any chemical or microscopic tests.

The Court: I will sustain the objection, because as far as appearance is concerned, the jury is as well able to observe its appearance as Mr. Pinker. In fact, under *People v. Manoogian*, they have held testimony of appearance is admissible even by a lay witness. But I do not think it is necessary in this case.

[fol. 244] By Mr. Roll:

Q. I have here what appears to be—it looks like a napkin, which I will ask to be marked People's Exhibit—

The Court: 16.

Mr. Roll: —16 for identification.

Q. I will ask you to examine this napkin and state whether or not you have seen it before.

A. I have.

Q. Where did you first see it?

A. I saw this napkin on the same occasion at the same place.

Q. Where was it, please?

A. I found it lying on the floor underneath a pair of shoes.

Q. Is this the point here (indicating on a photograph)?

A. Yes, it is, illustrated in People's Exhibit 11.

Mr. Roll: I will just point that out quickly to the jury.
(Photograph exhibited to the jury by Mr. Roll.)

Mr. Roll: You may cross-examine.

Cross-examination.

By Mr. Safier:

Q. Mr. Pinker, you first went to apartment 410 at 744 South Catalina Street on the evening of July 25, 1944?

A. Yes, it was on July 25th, and my best recollection is it was in the evening.

Q. About what time in the evening was it?

[fol. 245] A. It was, as I recall, some time shortly after the dinner hour.

Q. Who went with you, if anyone?

A. I went alone.

Q. You went alone. How did you gain entrance to the apartment?

A. The apartment was open. There were homicide detectives from Central Homicide Bureau there, there were detectives from the Wilshire Detective Bureau there, Robert Putoff, Los Angeles Police photographer, was there, and the fingerprint expert, I believe Mr. Larbaig, in this instance was present there.

Q. All of those persons you have just named were present in the apartment when you arrived?

A. Yes, sir.

Q. Now, when you arrived was the body still on the floor in the position in which it appears on Exhibit 8?

A. Yes, it was.

Q. Was the pillow still on the face?

A. Yes. There were two pillows; there was a pillow and a seat cover from the davenport over the head of the body.

Q. Was the coat still on the body?

A. Yes, the coat was over the body. The view that I first had of this scene was just as it is shown in these photographs. The photographs were in the process of being taken at the time that I arrived.

[fol. 246] Q. Now, tell me again where you found the orange-colored handkerchief.

A. The orange-colored handkerchief I found in a drawer in a dressing alcove halfway between the kitchen and the living room.

Q. I see. Where did you find the white one with the green stripe?

A. The white one with the green stripe and brown stains I found on a large chair, the chair that is illustrated in People's Exhibit 11.

Q. Where did you find the napkin?

A. The napkin I found underneath the shoes which were lying in front of this large chair.

Q. How far from the chair were the shoes?

A. Well, it was just as illustrated in People's Exhibit 11.

Q. How far would you judge it to be when you looked at it?

A. I can only refresh my recollection by studying the photograph. I would estimate the shoes were within a foot of this chair.

Q. And a part of a silk stocking you found underneath the body?

A. Yes, that was on the floor lying underneath the body. It was not apparent until the Coroner's deputies began removing the body. I made search of the apartment for [fol. 247] additional parts of torn stockings and found none.

Q. Did you find any other stockings at all?

A. Yes, there were a number of stockings hanging up, apparently drying, in the kitchen. There were also stockings in drawers in the dressing alcove.

Mr. Safier: That is all.

Mr. Roll: That is all.

The Witness: May I be excused, your Honor?

The Court: Yes, you may be excused.

(Witness excused.)

ROBERT FRICK, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. Robert Frick.

Direct examination.

By Mr. Roll:

Q. Your full name is Robert Frick, is that true?

A. Robert Frick.

Q. Where do you live, Mr. Frick?

A. 744 South Catalina.

Q. About how long, sir, have you lived there?

A. A little over five years.

Q. Does your wife live there also?

[fol. 248] A. Yes.

Q. Are you employed there?

A. Yes, sir.

Q. How long have you been employed there?

A. A little over five years.

Q. Generally, what are your duties there, Mr. Frick?

A. Well, I take care of all the cleaning and repair work.

Q. Directing your attention to the apartment known as apartment 410 there, at that address, up on the fourth floor, the one formerly occupied by Mrs. Blauvelt, you are familiar with that apartment, are you?

A. Yes, sir.

Q. Are you familiar with what we might call the garbage disposal unit?

A. Yes, sir.

Q. That is illustrated here, sir, by this "Garbage Compartment" that you observe on the drawing between "D-1" and "D-2" there?

A. Yes, sir.

Q. It is also illustrated by these pictures here on People's Exhibit No. 2, the side view?

A. Yes.

Q. Now, with reference to that garbage disposal unit, I am going to ask you some questions, Mr. Frick. How tall are you, sir?

A. Pardon?

[fol. 249] Q. What is your height? How tall are you?

A. 5 foot 7½.

Q. What is your weight?

A. 130.

Q. Do you want to step down here, Mr. Frick, right alongside of where the defendant is seated?

A. Yes.

(Witness leaves witness stand.)

Mr. Roll: Right over here, if you will.

(Witness stands near defendant.)

Mr. Roll: I will ask if the defendant might stand, please.

The Court: The defendant will stand for the purpose of identification.

(Defendant stands alongside of the witness.)

Mr. Roll: That is fine. You can come back, Mr. Frick.

(Witness thereupon resumes the witness stand.)

Q. Now, did you have occasion, Mr. Frick, some time after the date of the 25th of July, 1944, to yourself try and—not try, but crawl through that garbage disposal unit, from "D-1" to "D-2"?†

A. Yes, sir.

[fol. 250] Mr. Safer: Objected to as irrelevant, incompetent and immaterial and has no bearing upon any of the issues in this case.

The Court: Overruled.

By Mr. Roll:

Q. Just tell us what you did, did you get through or did you get stuck?

A. No, sir, there was plenty of room.

Q. You did get through?

A. Yes, sir.

Q. About when did you do that, do you know?

A. Oh, about six weeks ago.

Q. About six weeks ago. Now, Mr. Frick, with reference to the janitor service there, cleaning of the apartments, during the month of July when were you cleaning the apartments up on the fourth floor, particularly apartment 410?

A. Mrs. Blaauvelt's apartment had been on Wednesday.

Q. On Wednesday?

A. Yes.

Q. How often, sir?

A. Every other Wednesday.

Q. That would be every two weeks?

A. Every two weeks.

Q. And with reference now to the date of the 25th of July, which was on a Tuesday, when would have been the next day that you cleaned the apartment?

A. That would have been on the 26th, the day after.

[fol. 251] Q. And you had previously cleaned the apartment two weeks before?

A. Yes, sir.

Q. With reference to this garbage disposal unit on the inside there, Mr. Frick, on the kitchen side in apartment 410, there was a door which is depicted in this diagram as view 1 of People's Exhibit 2; is that correct?

A. Yes, sir.

Q. Now, with reference, sir, to the—I have here a photograph which I will ask be marked for identification at this time.

The Court: 17 for identification.

Mr. Roll: 17.

Q. I am going to ask you to look at People's Exhibit 17, Mr. Frick, merely sir, at the door there, which is shown in the back of the picture?

A. That is a door leading to the hall.

Q. Now I am going to ask you, sir, with reference to the dates of the 24th and 25th of July in apartment 410, with reference to the type of lock, that is a door knob and anything else with reference to the door leading from 410 out into the hall: Can you explain what that was?

A. Well, there is just a knob lock there, that is a regular door lock and there is a chain lock on the inside.

Q. But with reference to when you want to go out that door if you are inside of the apartment you do not have to [fol. 252] insert any key, do you?

A. That is always open, the lock is always open from the inside.

Q. And from the outside—

A. It is locked.

Q. Now, is there some method, if you want to, on the lock where you can take a plunger so that you cannot enter?

A. By pressing a button the bolts that is in the lock there, you push one back.

Q. And if you do that cannot come in from the outside without a key?

A. You can throw the lock off by doing that.

Q. And this chain lock that you mention is one that can only be put on from the inside?

A. Just a chain lock to leave the door extend open about 3 inches.

Q. Now, Mr. Frick, with reference to the collection of the garbage from the various units there in the apartment, who takes care of that, sir?

A. I do.

Q. And do you do that in the morning or evening?

A. In the morning.

Q. Now, directing your attention now, sir, to the date on which Mrs. Blauvelt's body was found, the morning of that date, the 25th day of July, 1944, did you on that morning have occasion to go up on the fourth floor and do [fol. 253] anything with reference to the garbage in apartment 410?

A. Yes, sir.

Q. What, if anything, did you do, sir?

A. Pardon?

Q. What did you do with reference to that?

A. Well, I found that the garbage tin was not in the place where Mrs. Blauvelt usually kept it.

Q. Where was it, sir?

A. It was in the corner, in the other corner, I would say, the southwest corner of the service board.

Q. About how large a garbage container was that, can you indicate with your hands how big a container it was?

A. Oh, the container is about 8 or I will say 9 inches, the container about 12 inches high.

Q. About 12 inches high and 8 or 9 inches across?

A. Yes.

Q. And in so far as the garbage itself was concerned, did you pull the can out that morning?

A. Yes, sir.

Q. Do you recall whether there was any garbage in there or whether there was not?

A. Yes, sir.

Q. Well, what was the situation?

A. There was nothing in it.

Q. Nothing there?

A. No, sir.

[fol. 254] Q. Now, in doing that, Mr. Frick, can you tell me when you reached in to get the garbage out, did you bend down to do it, or do you do it from a crouched position or get down on your hands and knees, or how do you do it?

A. Well, I would say a crouch.

Q. Now, did you look into the unit at the time or just reach in and get the can and pull it out?

A. I just pulled it out; I didn't look.

Q. You didn't pay any attention?

A. I didn't pay any attention only to where the tin was located.

Q. So you are unable to say anything with reference to the door there on the inside?

A. No, I don't know about that.

Q. You did not look for that at all?

A. No, sir, I did not look.

The Court: This may be a good place to break. We will take our noon recess at this time, and the jurors will keep in mind the admonition not to talk about the case or form or express any opinion. Take a recess until 1:45.

(Whereupon a recess was taken until 1:45 o'clock p. m. of the same day, Thursday, November 16, 1944.)

[fol. 255] Thursday, November 16, 1944; 1:45 o'clock P. M.

The Court: The record will show the jury, counsel and defendant present. You may proceed.

The Clerk: Mr. Frick, please.

ROBERT FRICK, recalled:

Mr. Roll: I have no more questions.

Cross-examination.

By Mr. Safier:

Q. Mr. Frick, which apartment do you occupy at 744 South Catalina Street?

A. 110.

Q. How long have you occupied apartment 110?

A. 110, how long?

Q. Yes?

A. A little over five years.

Q. Who else lives there with you?

A. My wife.

The Court: I do not see the materiality of that.

Mr. Safier: Very well. It is just a preliminary question.

Q. Now, Mr. Frick, When was it you made this experiment with the garbage disposal compartment.

A. About six weeks ago.

[fol. 256] Q. Do you remember the date?

A. No, I don't.

Q. At whose request did you make that experiment?

A. Pardon?

Q. At whose request did you make the experiment?

Mr. Roll: That assumes something not in evidence.

The Court: Sustained.

By Mr. Safier:

Q. Did you make that experiment at the request of somebody?

A. After the accident in there they installed a Yale lock.

Q. No, now, you can—

The Court: What the attorney wants to know, Mr. Frick, is did you try this all of—was it your own idea to try this or did someone tell you to try it?

A. No, I went in there to release this lock and the keys at the present time was not in the house.

The Court: Did anybody tell you to do it?

A. Yes.

The Court: Who did?

A. My wife.

The Court: That settles that.

By Mr. Safier:

Q. Did you only crawl through that compartment the one time, Mr. Frick?

A. Yes, sir.

Q. Just on the one occasion. Now, at the time that you [fol. 257] made that experiment and crawled through that garbage compartment, was the door represented by D-1 on this large drawing on?

A. Is that the inside?

Q. That is the hall side.

A. The hall side. Yes, sir, that door was on.

Q. Is there any lock on that door?

A. Just the latch.

Q. Just the latch. Now, at that time, the time that you made that experiment, was the door represented by D-2 on the large drawing, being the inside door on?

A. The kitchen, no, sir.

Q. That was off. Now, was there a shelf in that garbage compartment at the time you made that experiment?

A. Yes, sir.

Q. Did you crawl—you did crawl through there, didn't you?

A. Yes, sir.

Q. Did you crawl under or over the shelf?

A. Under.

Q. Under the shelf. Are there some pipes in there in that compartment?

A. No, sir.

Q. No pipes in that—

A. Just lined with tin.

Mr. Roll: I cannot hear you, Mr. Frick.
[fol. 258] The Court: Keep your voice up, Mr. Frick. It is pretty hard to hear you.

A. It is lined with tin.

By Mr. Safier:

Q. Now, is there a lock on the inside door there ordinarily?

A. Just the latch.

Q. Just the latch and the latch opens from the kitchen side?

A. Yes, sir.

Q. In other words, if the door, the kitchen side door of the garbage compartment is closed with a latch it can only be opened from the kitchen?

A. Yes, sir.

Q. Now, did you do the cleaning in the apartment, Mr. Frick?

A. Yes, sir.

Q. When prior to July 24th did you do any cleaning in apartment 410?

A. Well, that was just about two weeks before.

Q. And do you have an independent recollection of having cleaned in that apartment two weeks before July 24th or do you say that just because it was your custom to clean there every two weeks?

A. Well, that is because we clean every two weeks.

Q. Prior to the time you made the experiment by crawling through the garbage disposal compartment when had [fol. 259] you last been in apartment 410 for any reason?

A. As far as I remember the last time we cleaned in there.

Q. I see. Were you about the premises at 744 South Catalina Avenue all day on July 24th of this year?

A. Yes, sir.

Q. And on July 25th of this year?

A. The 23rd?

Q. The 25th?

A. The 25th. I was there all day.

Q. You were not away from the building at any time those two days?

A. No, sir.

Q. Now, did you at any time, either on July 24th or July 25th, hear any unusual noises or sounds?

A. Pardon?

Q. Did you on either of those two days hear any unusual noises or sounds about the building?

A. No, sir.

Q. Do you remember on what floor you were working either on the 24th or 25th of July?

A. On the fourth—the third and fourth.

Q. On the third and fourth?

A. On the third and fourth.

Q. Which day were you working on the third and fourth, was it on the 24th or 25th or on both days?

[fol. 260] A. Well, we work on both floors each day.

Q. You work on both floors each day?

A. Yes, sir.

Q. Do you remember what time of the day on the 24th you were on the fourth floor?

A. That was on a Tuesday, was it?

Q. Monday?

The Court: May I have just one moment, please?

A. I think we were there about 9 o'clock.

(Short interruption on other court business.)

[fol. 261] The Court: You may proceed.

Mr. Roll: What was that answer, please?

(Answer read.)

By Mr. Safier:

Q. Now, we are referring to Monday, July 24th. Can you tell me what time of day you were working on the fourth floor?

Mr. Roll: I object to that as having been asked and answered. He said about 9 o'clock.

The Court: You may answer it again.

A. About 9 o'clock.

By Mr. Safier:

Q. In the morning or in the evening?

A. Morning.

Q. How long did you stay on the fourth floor at that time?

A. Well, about 45 minutes, I think it was.

Q. Were you on the fourth floor at any other time on that date?

A. Yes.

Q. What time?

A. I don't remember.

Q. Was it in the morning or afternoon?

A. I think it was in the afternoon.

Q. The early part of the afternoon or the latter part of the afternoon?

A. I don't remember that.

Q. You did not hear any unusual noise at any time?

[fol. 262] A. Not any.

Q. Now, referring to Monday, July 24th, can you tell me what time of day you were working on the third floor?

A. No, I cannot remember that.

Q. Now, referring to July 25th, Tuesday, can you tell me what time of day you were working on the fourth floor?

A. Well, I would say around 11 o'clock.

Q. In the morning?

A. Morning.

Q. How long did you stay there at that time?

A. About 45 minutes.

Q. Was that the only time on Tuesday that you were on the fourth floor?

A. As far as I remember.

Q. How about the third floor? What time on Tuesday were you on the third floor?

A. Well, earlier in the morning.

Q. Now, referring to the lock on the door of apartment 410 prior to July 24th, when had you last made an examination or seen the lock on the door of that apartment?

A. I don't understand the question.

Q. I will reframe it. When did you last examine the lock on the door of apartment 410 prior to July 24?

A. Examine it? Well, I don't examine the locks without there is something wrong with them.

Q. Well, you do not know whether or not there was [fol. 263] anything the matter with the lock on July 24th?

A. Not that I know of.

Q. I beg your pardon?

A. Not that I know of.

Q. You do not know whether it was working or not, do you?

A. No, I don't.

Q. Now, I believe you testified the type of lock—strike that. Is the lock on that door a lock that is in the door handle itself?

A. No, it is not. It is in the door, in the frame, in the lock; you push a button—

Q. I am sorry. I did not hear you, Mr. Frick.

A. You push a button in on the lock itself. It is not one that has a snap on the lock, on the knob.

Q. It hasn't got a snap on the knob?

A. No.

Q. Well, is it a Yale lock?

A. Pardon?

Q. Is it a Yale lock?

A. No, it is not a Yale.

The Court: Is it a Schlage lock?

A. Well, it is a regular lock, mortised in the door.

The Court: You do not know the name of the particular manufacturer?

A. No, I do not.

By Mr. Safier:

Q. Is it a lock that is fastened on the inside of the door?
[fol. 264] A. No, it is set right into the door.

Q. It is set right into the door?

A. Yes.

Q. It has two little buttons on it?

A. It has two little buttons on it.

The Court: Right in the center of the lock?

A. Right in the center of the lock.

The Court: Most doors have these little buttons on the side edge of the door.

A. Yes, in the edge.

The Court: This one does not have those buttons, or does it?

A. It is right along the edge that closes to the frame.

The Court: You push one which releases the latch and the other one locks it?

A. Yes, the other one locks it.

By Mr. Safier:

Q. If you push one of those buttons the door can be opened from either side without a key, can it?

A. If you push one the door from the inside—the door from the inside can be opened at any time, but when you push—you can lock it on the outside or release the lock by one.

Q. Well, can you, by pushing one of those buttons, fix the door so it can be opened either from the inside or outside without a key?

[fol. 265] A. Yes, sir.

Q. If you push the other button it can be opened only from the inside but not from the outside; is that correct?

A. That is correct.

Q. And in addition to that there is a chain lock?

A. Yes, sir.

Q. I believe you testified that you took care of the collection of the garbage in the building?

A. Yes, sir.

Q. And do you do that every morning?

A. Yes, sir, all but Sundays and holidays.

Q. Did you collect the garbage from apartment 410 on the morning of July 24th?

A. That was on Tuesday morning? Yes, sir.

Q. That was on Monday, July 24th?

A. Monday morning.

Q. Monday morning, July 24th?

A. Both Monday and Tuesday.

Q. Did you collect it again on Tuesday?

A. Yes, sir.

Q. July 25th?

A. Yes, sir.

Q. And on Tuesday morning, July 25th, the garbage pail was in the garbage compartment, wasn't it?

A. Yes, sir.

Q. Now, you testified something about it being in a [fol. 266] certain portion of the garbage compartment. Which portion was it in on Tuesday morning?

A. It was, I would say, in the southwest corner.

Q. In the southwest corner of the garbage compartment?

A. Yes, in the far corner.

Q. Can you tell me in which part of the garbage compartment the garbage pail was on Monday morning, July 24th?

A. Well, it was right next to the outside door, as far as I remember.

Q. Did you also collect the garbage pail from apartment 408 on the morning of July 25th?

A. Yes, sir.

Q. In what portion of the garbage compartment was the pail in that apartment?

A. That was—it could be any place.

Q. It could be any place?

A. Yes.

Q. Do you remember where it was?

A. I don't remember.

Q. Can you tell me with reference to any other apartments in that building in what part of the garbage com-

partment the pail was setting on the morning of July 25th?

A. No, because there are too many people that do not have one place; certain people have one place where they always keep it, and other people don't.

Q. Well, referring to apartment 408, now, does the party [fol. 267] that lives in that apartment keep the garbage pail in any part of the garbage compartment?

A. They just put it in anywhere, as far as I remember.

Q. As a matter of fact, as to all of the tenants in the building, they just put their garbage pail anywhere in the garbage compartment, do they not?

Mr. Roll: I object to that as asked and answered.

A. Not all of them. Some of them have a regular place to keep them.

Mr. Roll: Withdraw it.

By Mr. Safer:

Q. Tell me which tenants of the building have a particular spot in the garbage compartment.

A. Well, Mrs. Blauvet had—

Q. Let me finish my question, please, Mr. Frick. Tell me which of the tenants of the building that had one particular section in that garbage compartment upon which they set their garbage.

A. I do not remember that, but I do remember Mrs. Blauvelt because she never had but very little garbage in her pail, and she always kept it next to the outside door without a lid on it.

Q. Were there any other tenants that had very little garbage in their pail?

A. Yes, there are some of them that did not have very much.

Q. Any other tenants that always kept the garbage pail [fol. 268] close to the outside door too?

A. Yes, there was.

Q. Who are they?

A. Well, I cannot tell you just who. I could take you out there and show you, if you would like to go out.

Q. Was Mrs. Blauvelt the owner of two garbage pails?

A. She had a garbage pail and a waste paper basket.

Q. Did you see the waste paper basket on the morning of July 25th?

A. The waste paper basket was not in that morning.

Q. It was not there that morning. Were there any other mornings that the waste paper basket was not there, too?

A. Well, there are certain mornings that she would have the waste paper basket in; not that morning.

Q. I see. Now, on the morning of Tuesday, July 25, 1944, when you collected the garbage of apartment 410, did you observe whether or not the inside door, that is the kitchen side door, of the garbage compartment was closed or open?

A. I did not notice that.

Q. Well, if it was open you could have seen right through it, could you not?

Mr. Roll: Just a moment. I object to that, if the court please, on the ground—

The Court: Purely speculative in view of the previous testimony in the record, which I think counsel has forgotten. [fol. 269] The witness testified he did not look in there.

Mr. Safier: Well, I think he testified he crouched, did you not?

The Court: Yes, but he also testified he did not look in there.

By Mr. Safier:

Q. Is it a fact that you did not look into the garbage compartment on that morning?

A. I just looked for the location of the garbage tin, that is all.

Q. You did look in the compartment to see the location of the tin, did you not?

A. Only in the service door.

Q. Did you have to reach into the garbage compartment to reach the garbage pail?

A. Yes, sir, you had to reach to get it.

Q. And as you reached in did you look into the compartment?

A. The service door is directly in front of you when the door leading to the kitchen—it would be on the left side as you were taking that out. I just look straight in there to see where the garbage tin was, not noticing whether the door was open or closed on the inside.

Q. Well, did you notice whether or not any light was coming from the kitchen into the garbage compartment?

A. No, sir, I did not.

Q. No, sir what, you did not notice or there was no [fol. 270] light?

A. I did not notice it.

Q. Did it appear to be dark in the garbage compartment at that time?

A. Well, she could have had her window shades down and the kitchen could have been dark.

Q. Wait a minute—

The Court: Do you remember whether it was dark when you looked in there, or not?

A. Yes, it was fairly dark.

By Mr. Safier:

Q. What do you mean by fairly dark?

A. Well, it was not clear.

Q. Was it as dark as—strike that. Would you say that it was dark in the same—would you say that the lighting in the garbage compartment on the morning of July 25th, when you reached for the pail, would you say that the darkness in the garbage compartment was about the same as it was on every other morning?

Mr. Roll: Just a minute, if he noticed. I have no objection to the question if he noticed.

The Court: You may answer. Did you notice any different conditions as to light or dark on that particular day?

A. Well, no, not at that particular time of the year there would not be a lot of difference only in case of the day being cloudy outside.

[fol. 271] By Mr. Safier:

Q. Did it appear to you to be about the same on July 25th as it was every other day during the preceding two weeks that you collected the garbage?

A. Well, I didn't notice that.

[fol. 272] Q. Well, did you notice any difference on the morning of July 25th as to the lighting or the darkness in the garbage compartment as compared with any other day during the preceding two weeks?

A. Well, I don't remember that.

Q. Can't you tell us, Mr. Frick, whether you noticed any difference at that time?

Mr. Roll: I object to that as asked and answered.

The Court: He just answered the question. I do not think it should be repeated. The objection is sustained as asked and answered.

Mr. Safier: I have no further questions.

Redirect examination.

By Mr. Roll:

Q. Mr. Frick, counsel asked you with reference to the locks. Did you have any complaint from any source around the 24th or 25th of July or, we will say, the 22nd about that lock being out of order?

A. No, sir.

Q. Did you have any complaint about that door there, the inside door which you marked on the diagram as D-2, anything being wrong with that?

A. Leading to the kitchen?

Q. Yes, sir.

A. No, sir.

Q. Did you have any complaint about that?

[fol. 273] A. No, sir.

Q. I believe you testified on cross examination that on the morning of the 25th when you went to reach in there to get the garbage can, what did you say about the lid?

A. Mrs. Blauvelt never kept the lid on the garbage can.

Q. Yes?

A. And that morning it was on.

Q. And that morning it was on?

A. On.

Mr. Roll: No further questions.

Recross-examination.

By Mr. Safier:

Q. Mr. Frick, do you mean to tell us during the five years that you collected garbage there, July 25th is the only morning that you ever found the lid on the garbage pail in Mrs. Blauvelt's apartment?

A. Mrs. Blauvelt did not live in that apartment five years.

Q. Well, do you mean to tell us, then, that as long as you

have been collecting the garbage at Mrs. Blauvelt's apartment, whenever she lived, that July 25th was the only time in all the time that you collected the garbage there, that you found the lid on the pail?

A. As far as I remember.

Q. I see, all right. Now, ordinarily when you collected the garbage from Mrs. Blauvelt's apartment the kitchen [fol. 274] door to the garbage compartment was closed, was it not?

A. I would not say that it was closed at all times.

Q. Well, was it closed most of the time?

A. Most of the time.

Q. How frequently during the past year would you say you found the kitchen side of the garbage compartment open?

A. I never counted it.

Q. But when you collected the garbage you could very easily tell ordinarily whether the kitchen side of the compartment was open or closed, could you not?

A. Well, no, you do not do that, you do not look in there to find out whether they are open or closed. When you are doing your work you are just carrying on your work. You do not bother about those other little details.

Q. Mr. Frick, if you did not look in there, then, how do you know it was closed most of the time but open some times?

A. Well, there are times you look at it and there are times you do not.

Q. I see. Sometimes you look at it and sometimes you don't?

A. Yes, sir.

Mr. Safier: That is all.

[fol. 275] Redirect examination.

By Mr. Roll:

Q. What time of the morning on the 24th or 25th would you pick up the garbage?

A. About 6:30.

Q. A. M.?

A. In the morning.

Q. And you told counsel on cross examination that some time in the morning, I believe on both the 24th and 25th,

you were up on the fourth floor, I think you said for about 45 minutes. Do you remember what you were doing?

A. I was cleaning apartments.

Q. You were on the inside cleaning some apartments?

A. Yes, sir.

Q. What do you use, a vacuum cleaner to clean?

A. Yes, sir.

Q. What kind?

A. A Hoover.

Q. An electric one?

A. Yes, sir.

Q. One that works off of one of these plugs?

A. Pardon?

Q. Works off an electric plug?

A. Yes, sir.

Q. Is it a small Hoover or a big one they use in apartment houses?

[Vol. 276] A. Well, it is quite large.

Q. Makes a little noise?

A. It is a regular—yes, sir.

Mr. Roll: That is all.

Recross-examination:

By Mr. Safier:

Q. Which apartment were you cleaning on July 24th on the fourth floor?

A. Well, I think it was 409.

Q. 409?

A. Yes, sir.

Q. That is the apartment directly opposite from 410?

A. Across the hall, yes, sir.

Q. Did you clean any other apartment on the fourth floor on July 24th?

A. Yes, sir.

Q. On the fourth floor?

A. Yes, sir.

Q. Which one?

A. 406, I think it was.

Q. Where is 406 located?

A. That is about the third apartment down on the south side of the building.

Q. You cleaned both of those apartments on the morning of July 24th, Monday?

A. I don't remember that.

[fol. 277] Q. Do you remember whether it was Monday or whether it was Tuesday?

A. It was Monday.

Q. It was Monday?

A. Monday, but I don't remember the time.

Q. You don't remember whether it was morning or afternoon?

A. No, sir, I don't, when I cleaned 406.

Q. Didn't you have one particular day for each floor for cleaning purposes?

A. Well, no, we work from one floor to the other, different days of the week.

Q. You don't take one floor on Mondays, another floor on Tuesdays, another floor on Wednesdays? Don't you work it that way?

A. No, sir; we only give them every two weeks service.

[fol. 278] Q. Do you remember what apartment you were cleaning on the fourth floor on Tuesday morning?

A. Tuesday morning? I don't remember that.

Q. You don't remember?

A. No.

Mr. Safer: That is all.

Mr. Roll: That is all. May this gentleman be excused?

The Court: He may be excused.

(Witness excused.)

Mr. Roll: Mr. Osmon.

KEN LEMAR OSMON, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. Ken Lemar Osmon.

Direct examination.

By Mr. Roll:

Q. What is your full name?

A. Ken Lemar Osmon.

Q. How do you spell your last name?

A. O-s-m-o-n.

Q. How old are you, Ken?

A. Fifteen, last September.

Q. Where do you live?

[fol. 279] A. 919 South New Hampshire.

Q. Do you go to school?

A. Yes, sir, I do.

Q. What school do you go to?

A. Loyola High School.

Q. That is located down on Venice Boulevard near Vermont?

A. Yes.

Q. During the summer months were you working?

A. Yes, I was working for Mr. Farmer, delivering papers.

Q. Were you soliciting papers too?

A. Yes, I was.

Q. What paper were you soliciting for, do you remember?

A. The Examiner.

Q. Did you have occasion to go into an apartment house down on South Catalina, No. 744?

A. Yes. In fact, I went through the whole two blocks on Catalina.

Q. Was that during the month of July, do you remember?

A. Yes.

Q. Do you remember being in the apartment house at 744 on any particular day?

A. No, I don't. I believe it was either Friday or Saturday. I wouldn't say for sure. I know I turned some orders in that night, and that would be the night that I solicited.

[fol. 280] Q. What you did was that when you went into this apartment you would go around and rap on the various doors?

A. Yes.

Q. And if someone answered you would talk to them; is that correct?

A. That is right.

Mr. Roll: Will you stand up, please?

(Lady in audience rises.)

Mr. Roll:

Q. Do you remember talking to this lady?

A. I couldn't say for sure. You see, I talk to so many people.

Mr. Roll: That is all.

The Court: Just one question, Ken. Can you give us any better idea than it was in July? Can you tell us about when in July it was?

A. Yes, it was, I believe—I know police officers came down and told me that I had been soliciting there and there had been a murder there.

Mr. Safer: Just a minute. I object to any hearsay evidence.

The Court: This is not hearsay. He is trying to fix the date by something. Some police officers came to you?

A. Yes. We read in the paper, of course, there had been a murder there, and I believe—in fact, I know I was either in there Friday or Saturday of the preceding week.

The Court: In other words, you were in there a few days [fol. 281] before you read the account in the paper; is that about the way it was?

A. I believe it was one or two days before.

The Court: One or two days before. You may cross examine.

Cross-examination.

By Mr. Safer:

Q. Your best recollection is that it was on Friday or Saturday that you went into the apartment at 744 South Catalina Street?

A. Yes.

Mr. Safer: That is all. No further questions.

Redirect examination.

By Mr. Roll:

Q. Now, just one thing more: Mr. Wiseman here and Mr. Brennan took you back there to the apartment house later on, didn't they?

A. Yes.

Q. For the purpose of refreshing your recollection, do you remember telling them that you thought it was on Monday night you were there?

Mr. Safer: Just a minute. I object to that as being—
The Court: Sustained.

Mr. Safer:—in the nature of impeachment.

The Witness: You see, it has been so long—

Mr. Safer: Just a moment.

[fol. 282] The Court: Objection sustained. You cannot answer the question, Ken.

Mr. Safer: The judge says you cannot answer it.

The Court: We have certain rules here the same as we have in basketball.

Mr. Roll: That is all. May this young man be excused?

The Court: Yes, he may be excused.

(Witness excused.)

JAMES R. FERGUSON, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. James R. Ferguson.

Direct examination.

By Mr. Roll:

Q. Will you state your full name, please?

A. James R. Ferguson.

Q. Mr. Ferguson, what is your business or occupation?

A. Police officer, City of Los Angeles, attached to the Scientific Investigation—

Q. How long have you been engaged as a police officer?

A. A little over four years.

Q. What division or detail are you attached to?

A. Scientific Investigation Bureau, latent fingerprints [fol. 283] section.

Q. Mr. Ferguson, how long have you been working in that department?

A. Approximately eighteen months.

Q. Were you working in that department on the date of the 25th of July, 1944?

A. I was.

Q. Did you have occasion to go to apartment No. 410 on that date?

A. I did.

Q. About what time of day did you go there, sir?

A. Approximately noon time.

The Court: Fix the apartment house and address.

By Mr. Roll:

Q. 744 South Catalina Street?

A. Yes.

Q. Were there some other officers there when you arrived?

A. Yes, there was.

[fol. 284] Q. Do you remember if Mr. Wiseman and Mr. Brennan were there?

A. I believe they were both there.

Q. Did you see Mr. Pinker there?

A. Yes, I did.

Q. As a part of the equipment that you take along with you when you go out on a call such as the call that you went on on this night, what type of equipment do you take with you?

A. I had a fingerprint camera, some brushes, some fingerprint powder and some Scotch tape.

Q. When you say fingerprint camera, can you tell us a little more about it, please?

A. Well, it is an Eastman fingerprint camera with a fixed focus; place it immediately over the fingerprints and turn it on; it is operated by batteries from the inside.

The Court: For the ladies to get a better idea, it is something like a shoe box, it is black, and you set it right on top of the fingerprints; is that right?

A. That is right.

By Mr. Roll:

Q. With reference to the brushes, will you tell us what kind of brushes?

A. I have camel's hair brushes.

Q. And you say some powder?

A. Yes.

Q. Now, will you tell us—I am not going into too many [fol. 285] details with reference to it at this time, as I expect to call some other witnesses—with reference to

when you start looking on a surface for prints, just how do you do it? Will you tell us that, please?

A. Well, you take your brush, dip it in the powder and rub the powder lightly over the surface that you are examining for fingerprints, and the powder adheres to the surface where the fingerprint is.

Q. That is, if you do get some prints there and desire to take a photograph of them, you take your camera and take a photograph?

A. Yes, that is right.

Q. The Scotch tape you mentioned, what do you use that for?

A. After photographing the print we lift the print from the surface, put it on a card and keep the card with the lifted print on it.

Mr. Roll: May I have the next exhibit number?

The Court: The next number is 18.

Mr. Roll: May this be marked People's Exhibit 18 for identification?

The Court: It may be so marked.

Mr. Roll: For the purpose of identifying it, it is a picture of a part of the kitchen of apartment 410.

Q. Directing your attention to this photograph, Mr. Ferguson, I will ask you to examine that photograph and [fol. 286] state whether or not that is a fair representation of the kitchen in apartment 410 at 744 South Catalina Street?

A. Yes, it is.

Q. Now, I notice in that photograph that there are some newspapers there on the floor. Were those papers there when you arrived?

A. No, I put those papers on the floor myself to keep the black powder from getting on the floor.

Q. I notice in the photograph, right in the forepart of the photograph, what appears to be a door. Where was that door there in the apartment when you first saw it?

A. Approximately the same place it is now in the photograph.

Q. By approximately the same place it is now in the photograph, I take it, you mean by that answer that it was in the kitchen part of apartment 410?

A. Yes, it was, near the sink.

Q. Near the sink?

A. Immediately in front of the sink.

Q. Lying up against the sink?

A. Yes.

Q. Directing your attention, Mr. Ferguson, to a door which at this time I ask to be marked People's Exhibit 19 for identification, I will ask you to look at that and state whether or not that is the same door that you have referred to in your testimony as having seen there in the kitchen on [fol. 287] the evening of the 25th of July, 1944, in apartment 410 at 744 South Catalina Street in the City of Los Angeles?

A. Yes, that is the same door.

Q. That is the same door that is shown in this photograph; is that correct?

A. Yes, it is.

Mr. Roll: Now, at this time, if the court please, I offer into evidence People's Exhibit 18, this photograph, and the door, People's Exhibit 19.

The Court: They may be so marked.

Mr. Roll: I would like to pass this picture, People's Exhibit 18, to the jury.

The Clerk: The door was marked once before as Exhibit 6.

Mr. Safer: Yes, I think it was at the time of the measurements.

The Court: That is right. We do have that marked as 6.

Mr. Roll: I am sorry, your Honor.

The Court: We will cancel No. 19 and let it remain as 6.

Mr. Roll: All right.

The Court: That is, it is 6 for identification.

Mr. Roll: I will now offer 6 into evidence.

The Court: Mark it into evidence.

By Mr. Roll:

Q. Now, with reference to People's Exhibit No. 6, did you do what you call dust People's Exhibit 6 out there at the apartment itself on the evening of the 25th of July, [fol. 288] 1944, for the purpose of determining whether or not there were any fingerprints on that door?

A. I did.

Q. And did you find some fingerprints on the door?

A. I did.

Q. What did you do after you found prints on the door?

A. After I found prints I made labels, placed them next to the print where they would show in the photograph, placed the camera over the label and the print and photographed the print and the label on the door.

Q. How many different photographs did you take of fingerprints on the door there? I mean, different locations?

A. Three different photographs of prints on the door.

Q. And then later on—I will get into this later—later on did you cover over that area with this Scotch tape, where you took the photographs?

A. I did. I made a lift of three groups, of three prints, the three prints that I had photographed, and then I re-developed them, redusted them, and covered them all with Scotch tape.

[fol. 289] Q. I will go back into that. If you can, take People's Exhibit 6—will you be kind enough to hold that up there just a second?

(Witness does as requested.)

Q. On the, we will say, kitchen side of the door, the outside of the door, facing into the kitchen,—I am now pointing on the door near the hinge side where there is some Scotch tape; is that one area where you took a picture of some fingerprint?

A. That is.

Q. I now come to the same side of the same door, People's Exhibit 6, on the side near where the little catch is and the knob down near the bottom; is that the second place where you observed some prints and took some fingerprints?

A. That is.

Q. Now, will you turn the door around, please, sir, on the back side of the door, on the metal portion thereof, near the center and approximately, I should say, 9 or 10 inches from the top, I notice there is another piece of Scotch tape; is that another area where you dusted and took some fingerprint pictures?

A. That is.

Q. Do you have in your possession at this time the negatives of those pictures that you took?

A. I do.

[fol. 290] Q. And do you also have smaller developed pictures from there with you, or not?

A. I do.

Q. Now, will you first pick out for me, forgetting the negatives for a minute, the two that you developed from what we might call the front side of the door?

A. I developed these two of the front side, the side toward the kitchen.

Mr. Roll: I will ask that this be marked People's Exhibit No. — is it 19?

The Court: We can use 19 now. I would suggest, in view of the fact that the mere numbers do not indicate anything, you probably are going to mark them all 19 as a series.

Mr. Roll: That will be satisfactory, your Honor.

The Court: Suppose—I merely make this suggestion to both counsel,—that we might letter them, and also indicate whether they are the front or the back of the door, so that we can keep track of it ourselves and the jury can keep track of it as the occasion arises.

Mr. Safier: Yes, that is a good suggestion.

The Court: Or a front.

Mr. Roll: Yes. This will be 19. Do you want to put an "A" behind that, your Honor?

The Court: Yes, I think so. You will probably want to get the initial—

Mr. Roll: 19-A.

[fol. 291] The Court: And the word "Front" after it.

Mr. Roll: All right, your Honor. I don't know whether they can mark these negatives or not.

The Court: I do not think it is necessary to mark the negatives. This remark is addressed solely to counsel—I do not think the negatives will be of any particular value as evidence, because they are in reverse and they are pretty hard to follow.

Mr. Roll: I expect to have to use the negatives later on.

The Court: I see.

Mr. Roll: Probably by some of the other witnesses.

The Court: Well, that is all right. Why not put all the negatives into one envelope? They can be segregated very easily by anyone who has to handle them.

Mr. Roll: All right, your Honor.

The Court: Mark all the negatives 20.

By Mr. Roll:

Q. The second one you have handed me, is that another picture taken from the front side of the door?

A. Yes, both of these are from the front.

Mr. Roll: May this be marked 19-B Front?

The Court: 19-B Front, yes.

By Mr. Roll:

Q. Do you have in your possession the one marked back side or metal side of the door?

A. I have.

Mr. Roll: I will ask that be marked 19-C Front inside. [fol. 292] A. Inside the garbage disposal section.

Mr. Roll: I will mark that 19-C inside metal.

Q. Now, these three negatives that you now hand me here, are they corresponding negatives—do you want to check these—to the 19-A, 19-B and 19-C?

A. Yes, they are.

Mr. Roll: May those, if the court please, be marked 20?

The Court: Yes, we will mark all of the negatives 20.

Mr. Roll: All right, your Honor. I will give them to Mr. Moore, if he has a small envelope we can possibly put them in.

The Witness: I have an envelope here.

Mr. Roll: Oh, fine.

Q. Now, will you indicate with reference to, first, 49-A, which you have said was on the front, where that is located on the front, if you can describe it, please?

A. That is located on the left front of this section right here.

Q. That is on the side down below the glass knob?

A. Yes.

The Court: May I make a suggestion, Mr. Roll?

Mr. Roll: Yes, your Honor.

The Court: I do not see any objection, but I merely suggest it, however, we might put an "A" there and show the corresponding relationship.

Mr. Roll: On the door, your Honor.

[fol. 293] The Court: On the door itself. I have a colored pencil if you want to use it.

Mr. Roll: I think that will be very fine. I will use the red.

Q. All right, now, will you look at 19-B and tell me where that is?

A. 19-B is on the opposite side, right over here (indicating).

Mr. Roll: I will mark "B" with an arrow pointing to that.

Q. All right, now, 19-C, that is on the back side, I take it?

A. 19-C is on the back.

Mr. Roll: I will put a "C" here with an arrow pointing to it.

Q. Now, you also said that you took some lift prints?

A. I did.

Q. Now, will you describe to the court and the members of the jury what you mean when you say "lift prints"? What is a lift print?

A. A lift print is the developed latent print lifted with Scotch tape. It lifts the powder adhering to the surface of the print off. That is what is known as a lift print.

Q. When you use the term—we will go into a little more detail later on—latent print, what do you mean by a latent [fol. 294] print?

A. A latent print is a print left by the moisture from the fingers, and it corresponds to the pattern of the ridges on the surface of the inner finger.

Q. In other words, if I put my hand down here on this jury box rail, with my fingers like this, the surface is somewhat clean, I leave what is known as a latent print, is that it?

A. That is correct.

Q. Now, while you were working with this door there, did you notice anything—I notice that at the present time there is a screw there in the top hinge of People's Exhibit 6. Did you notice whether that was there at the time or not?

A. Yes, it was.

Q. Did you go around the apartment other than the door looking for fingerprints that you might photograph?

A. I examined a couple of glasses on the sink and I also examined a writing desk in the front living room.

Q. Did you find any prints that were good enough to develop?

A. No, I did not. I also examined the heels on the pair of shoes that were sitting on the floor beside the chair close to the door.

Q. Did you find any fingerprints on there that you could make pictures of?

[fol. 295] A. No, sir, I did not.

Mr. Roll: You may cross examine.

The Court: Just one question: You may want to ask the question on cross examination, and I think this is a matter relative to the word fingerprints. Mr. Ferguson, every time someone touches a piece of polished furniture does that indicate he is going to leave a fingerprint to be identified?

A. Not necessarily. If it is handled too frequently it gets an accumulation of moisture and grease from the fingers of other people.

The Court: What I am trying to get at is, I am trying to get you to tell this jury what we mean by a smudged print.

A. A smudged print is one that is in a condition that you cannot identify.

The Court: And why is it that you cannot identify it?

A. It is on top of other prints or it has been smeared when the fingers move and conditions were not ideal.

The Court: You may cross examine.

Cross-examination.

By Mr. Safier:

Q. What time was it you went out to apartment 410?

A. Approximately 9 o'clock.

Q. In the evening?

A. In the evening of July 25, 1944.

[fol. 296] Q. And when you got there tell us again who was present.

A. Ray Pinker was there while we were there. I don't know whether he was there when we got there or not. Officer Woodhull was with me, and I think Sergt. Wiseman and Sergt. Brennan were there too; also Capt. Thad Brown, of the Homicide Bureau, and Capt. Rasmussen of the Wilshire Detective Bureau.

Q. Were all of these people milling about the apartment at that time?

A. Well, they were in the front at the time we arrived.

Q. I see, all of them?

A. Well, to the best of my knowledge, they were.

Q. Was anybody in the kitchen?

A. Not at the time I went in there.

Q. I see. Now, did you go directly to the kitchen?

A. I was directed to the kitchen by Capt. Rasmussen, I believe, shortly after I got there.

Q. You commenced your search for prints in the kitchen, did you?

A. On the garbage disposal door, yes, sir.

Q. At the direction of somebody?

A. Yes.

Q. When you got into the kitchen was the light on?

A. Yes, it was.

Q. It was already on?

A. Yes.

[fol. 297] Q. Where was the garbage disposal door when you got into the kitchen?

A. It was leaning up against the cabinet underneath the kitchen sink.

Q. It was unhinged from the garbage compartment, wasn't it?

A. Yes, it was.

Q. You testified that you placed the papers that appear in this picture, Exhibit 18, underneath the door?

A. I did.

Q. Did you handle the door in doing that?

A. I merely touched the edges very carefully while I was placing the papers under it.

Q. You touched the edges of the door?

A. I touched the edges only.

Q. Now, I notice in the upper portion of this garbage disposal compartment there appears to be some things in there. Did you observe what they were at that time?

A. No, I did not. There is a shelf up over the section there. I do not recall what was in there.

Q. You do not recall. Now, where else in the apartment, if any place, did you search for prints?

A. As I said, I examined the glasses on the kitchen sink and the pair of shoes that were found on the floor, I took

them in the kitchen and examined them, and I examined a writing desk in the front room.

[fol. 298] Q. Did you make any examination of the front door of the apartment that leads into the hall for prints?

A. No, I did not.

Q. Did you make any examination of the body for prints?

A. No, I did not.

Q. Did you make any examination of the coat that was on the body for prints?

A. No, I did not.

Q. Or any cushions that were on the body?

A. I did not.

Q. Did you make any examination of the lamp for fingerprints?

A. I did not.

Q. Now, you said you examined some glasses in the sink. Did you find any prints on the glasses?

A. None that could be identified.

Q. Did you find any prints on the secretary that you looked at?

A. I did not.

Q. Have you told us every place that you did examine for fingerprints on that occasion?

A. As far as I can recall, that is all I examined.

Q. I see. From that examination is it a fact that you were unable to obtain any prints from any place other than this garbage disposal door?

A. That is correct, no prints that could be identified.

[fol. 299] Q. Now, when you say you made an examination of the glasses and the secretary, did you make that by sprinkling, dusting powder on it?

A. I did.

Q. Now, did you make these photographs of the prints of the garbage disposal door yourself?

A. I did.

Q. What kind of film did you use in that camera, is it a roll film?

A. No, it is a plate holder.

Q. A plate holder. A separate plate for each film?

A. That is right.

Q. When had you put the plates in with which you took these particular photographs?

A. I put the plates in my kit immediately before I went on the call.

Q. When did you put them in the camera?

A. I put them in the camera just before I took the photographs.

Q. How many photographs did you say you took altogether?

A. Three photographs.

Q. Three photographs. How many prints did you find on the door?

A. I found a few partial prints adjoining the single print on the inside that were smudges. In other words, they were prints that could not be identified, the ridge patterns were [fol. 300] destroyed.

Q. Did you take a photograph of them?

A. No. I photographed only the prints that could be identified and we found the prints that are in these photographs.

Q. Did you take the photographs before you put the Scotch tape on the prints?

A. I did.

Q. You did what?

A. I photographed them before I put the Scotch tape on them.

Q. I see. Now, how many different prints did you photograph of the door?

A. I will count them. In this there is one good one and part of a smudge; in this there are three and part of another.

Q. May I see those, please?

A. And in another photograph there are three fingerprints.

Q. Did you develop these pictures yourself?

A. I did not. I took them in to the laboratory and they were developed in my presence.

Q. How long did you remain in the apartment that evening?

A. It was almost 10 o'clock when I left.

Q. And did you take the camera to the laboratory on that [fol. 301] same evening?

A. No, I took the camera back to the office.

Q. Where is your office?

A. It is in the City Hall.

Q. You took your camera back to the office and left it there?

A. Yes.

Q. Overnight?

A. Yes.

Q. Is that office occupied by other persons besides yourself?

A. Yes.

Q. And other persons—strike that. Whereabouts in the office did you leave the camera?

A. In the cabinet where we keep the cameras.

Q. Were there other cameras in the cabinet?

Mr. Roll: Well, I am going to object to this on the ground it is immaterial.

The Court: I think we are getting into matters that have no relationship in particular. It is not material as to where he left the camera, whether he left it under lock and key or placed it in a cabinet—

Mr. Safier: I think we have a right to follow up these films—

The Court: You can follow it up, but we have him taking the camera into the room and having the film developed, and [fol. 302] there is no reason to find out what—

Mr. Safier: As I understand his testimony at that time, we are talking about when he left the cameras in the office, I believe the pictures were still in the camera.

The Court: Let's find out whether that was the situation.

By Mr. Safier:

Q. At the time you left the camera in the office were the films still in the camera?

A. No, the films were not.

Q. When had you removed the films?

A. Immediately after taking the photographs.

Q. You mean while you were still at the apartment?

A. Yes.

Q. What did you do with them, please?

A. Took the films out and put them in my kit.

Q. What did you do with the kit?

A. I brought the kit back into the office with the films.

Q. All right. Did you have some other films in that kit too?

A. No other exposed film, no.

Q. No other exposed film. Did you leave the kit in your office then overnight?

A. The kit was left in the office but I took the plates out and took them over to the laboratory.

Q. The same night?

A. Yes.

Q. About what time of night was it you got over to the [fol. 303] laboratory?

A. It was a little after 10.

Q. What did you do with the film after you got to the laboratory?

A. Took them in the laboratory and had them developed.

Q. I see. You handed them to somebody to develop?

A. Yes.

Q. You did not make the prints, make the negatives yourself there, did you?

A. No, I did not.

Mr. Safer: I think that is all.

Mr. Roll: Just one or two other questions, if the court please.

Redirect examination.

By Mr. Roll:

Q. In direct examination you said something about putting a marker on the film—I am looking for 19-A, B and C.

A. Wait a minute. I have them here.

[fol. 304] Q. Now, if I understand, before you actually took the pictures you did something with reference to the film itself so that there would be some printing on the film in conjunction with the print; is that correct?

A. I made a tag with the printing on it identifying the photograph.

Q. And that appeared—how did you make that tag, will you tell us that?

A. I wrote on a small piece of brown paper with adhesive on the surface, I wrote the date and the name of the victim and the place where I found the print, and I put my initials on there.

Q. You did that with reference to each one of the three pictures you took?

A. I did.

Q. And that was actually placed on the negative?

A. That was.

Q. So you positively know that those are the pictures that you took and those are the negatives; is that it?

A. Yes, that is right.

Q. Now, you told us about taking some lift prints. Do you have those with you?

A. Yes, I have.

Mr. Roll: I think I will ask that the lift prints be marked. The Court: 21 for identification.

[fol. 305] By Mr. Roll:

Q. Can you, if you can—we will mark that A, B and C also and try and make them correspond.

A. This is the one that corresponds with 19-C.

Mr. Roll: I will mark that 21-C.

A. This is the one that corresponds with 19-A.

Mr. Roll: I will mark this one 21-A.

A. This is the one that corresponds with 19-B.

Mr. Roll: I will mark that 21-B. Now, I will offer these in evidence, if the court please, as People's Exhibit 21.

The Court: Marked 21.

Mr. Roll: Cross examine.

The Court: May we proceed, please?

Mr. Safier: I have no further examination.

The Court: that is all, Mr. Ferguson.

(Witness excused.)

The Court: I think we will take our recess at this time. The jury keep in mind the admonition not to talk about the case or form or express any opinion. Take our recess for the afternoon.

(Recess.)

[fol. 306] MRS. LILLY W. BAILEY, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. Mrs. Lilly W. Bailey.

Direct examination.

By Mr. Roll:

Q. Will you state your full name again, please?

A. Mrs. Lilly W. Bailey.

Q. How do you spell your last name, please?

A. B-a-i-l-e-y.

Q. Where do you live, Mrs. Bailey?

A. I live at 918 South Manhattan Place.

Q. That is here in the City of Los Angeles?

A. Yes, sir.

Q. Is your occupation that of a housewife?

A. It is.

Q. Directing your attention to a lady by the name of Stella Blauvelt, did you know her during her lifetime?

A. I did.

Q. About how long had you known Stella Blauvelt prior to her death?

A. I think about twenty-five years.

Q. A social acquaintanceship?

A. She was my neighbor for many years. In fact, she owned a home right next door to my home.

[fol. 307] Q. Here in Los Angeles?

A. Yes, sir.

Q. About how long have you lived where you now live?

A. Thirty-five years..

Q. About how long did Mrs. Blauvelt live next door to you there?

A. I think about twenty-five, but the last two years she was not living there.

Q. Now, directing your attention to Sunday, the 23rd day of July, 1944, did you see Stella Blauvelt on that day?

A. I did.

Q. Where did you see her?

A. At my home.

Q. About what time did you see her?

A. She came about 2 o'clock in the afternoon.

Q. How long did she remain at your home, Mrs. Bailey?

A. Until a quarter of five.

Q. Did you notice whether, on that day, at your home, meaning the 23rd of July, on Sunday, that she was wearing any rings?

A. Yes, sir, she was.

Q. Did you see them?

A. I did.

Q. Can you tell us which hand she had the rings on?

A. On her left hand.

Q. During the time you have known her, after she moved [fol. 308] away, about how often would you see her?

A. Well, I think I might safely say, during the club season, about three times a month; not every week.

Q. Did you and Mrs. Blauvelt belong to some club together?

A. We did.

Q. What club?

A. Los Angeles Ebell.

Q. Do they have weekly meetings?

A. Yes, sir.

Q. What day is that?

A. On Monday.

Q. Over the period of years that you have known her, we will say, the last three or four years, limit it to that time, so far as her wearing rings are concerned, did you notice her wearing rings frequently, all the time, or what?

A. I never saw her without those rings.

Q. Can you tell the court and the members of the jury, Mrs. Bailey, anything about Mrs. Blauvelt that—I will withdraw that. There in your home on the 23rd of July, when Mrs. Blauvelt was talking to you, what, if anything, did she do with her hands?

A. She always used her hands when she talked, and that is why I noticed her rings so particularly.

Q. That was a habit of hers, was it?

A. What is that?

Q. Was that a habit of hers?

[fol. 309] A. Yes, sir.

Q. Will you, as best you can, describe the rings? I don't mean as to the details. I will ask you this question, first: Are you familiar with diamonds?

A. I am.

Q. Will you describe any of the rings she had as being ones containing diamonds?

A. They were diamonds.

Q. We will take the size of what we may call the largest ring; approximately what size would you say it was?

A. I think that was a solitaire, the large one.

Q. A solitaire?

A. Yes. At least over a carat, I should think.

Q. Then she had another ring?

A. Some cluster ring, too.

Q. She had a cluster ring, too?

A. Yes.

Q. And a wedding ring?

A. Yes, sir.

[fol. 310] Q. When she left your home there on the 23rd of July, on Sunday, how did she—did she just leave there or did you take her home?

A. We took her home.

Q. You took her back to her apartment on South Catalina?

A. Yes, sir, and left her there.

Q. About what time was that?

A. We left the house at a quarter of five, Sunday afternoon.

Q. About how far is that from you?

A. Well, it is a short distance, because Manhattan Place is just one block west of Western, and Catalina is east of there about five or six blocks. It is not but a very short distance from my home.

Mr. Roll: You may cross examine.

Cross-examination.

By Mr. Safier:

Q. I believe, Mrs. Bailey, you testified Mrs. Blauvelt lived next door to you, I think, until about two years ago?

A. She sold that home about two years ago, I think.

Q. Well, can you fix the time a little more certain, as to when she moved away?

The Court: What is the materiality as to whether it was—just the precise time two years ago? Frankly, I cannot see it.

Mr. Safier: Well, I will withdraw it.

[fol. 311] Q. Anyway, it was about two years ago?

A. Yes.

Q. Is that correct?

A. About that, I should say.

Q. You continued to see her after she moved away about how often?

A. Well, I might say about three times a month during the club season.

Q. What is the club season?

A. From the first of October until the latter part of June.

Q. From October until June?

A. Yes, sir.

Q. Now, when Mrs. Blauvelt was at your home on Sunday, July 23rd of this year, how many rings was she wearing?

A. Well, I could safely say she had three on her hands; there might have been more.

Q. Were they all on one finger or were they on different fingers?

A. On different fingers.

Q. On different fingers?

A. As I remember, yes, sir.

Q. Well,—

A. Not all—I don't think they were all on one finger.

Q. I beg your pardon?

A. I don't think they were all on one finger.

[fol. 312] Q. Let me ask you this question: Did she wear them all on one hand or was she wearing some on the left hand and some on her right hand?

A. I did not notice any on her right hand. I noticed those on the left hand because she always talked and used her left hand.

Q. How many rings do you recall were diamond rings?

A. Well, I can recall two vividly, diamond rings; there might have been more.

Q. What is the third ring that you recall?

A. I think a gold band wedding ring.

Q. Now, can you remember on which finger she had the gold band?

A. Why, on the one that one always wears their wedding ring on; that finger (indicating), next to the small—

Q. The third finger of the left hand?

A. Yes, sir, the third finger.

Q. Is that the finger Mrs. Blauvelt was wearing her ring on at that time?

A. Yes, sir.

Q: Now, referring to the diamond ring, can you tell me on which finger she was wearing the diamond ring?

A. I know there was one on the third finger and I think one on the small finger.

Q. One on the third finger and one on the small finger?

A. Yes, sir.

[fol. 313] Q. Is that the way she customarily wore her rings, one with her wedding band and one on her little finger?

A. I think so.

Q. I did not hear you; I am sorry.

A. Yes, sir.

Q. You left Mrs. Blauvelt at her home on July 23rd what time?

A. I should say about five minutes of 5. We left our house about a quarter of 5.

Q. Was that the last time you saw Mrs. Blauvelt alive?

A. Yes, sir.

Mr. Safier: That is all.

Mr. Roll: That is all.

Mr. Safier: One more question. Just one more question, please.

The Witness: Yes, sir.

Q. Did Mrs. Blauvelt wear her wrist watch when you saw her on that Sunday?

A. That I cannot recall.

Q. You do not recall?

A. No, sir.

Mr. Safier: All right, that is all.

(Witness excused.)

Mr. Roll: Call Mrs. Frances Jean Turner.

[fol: 314] MRS. FRANCES JEAN TURNER, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. Mrs. Frances Jean Turner.

Direct examination.

By Mr. Roll:

Q. Your name is Frances Jean Turner?

A. Yes, sir.

Q. Where do you live, Mrs. Turner?

A. 1739 West 36th Place.

Q. Maybe, if you will pull the microphone up, it will be a little easier for you. Will you give us that address again, please?

A. 1739 West 36th Place.

Q. Where is that with reference to Western Avenue in the city of Los Angeles?

A. It is west of Western Avenue.

Q. About how far?

A. Half a block.

Q. About how long have you lived there?

A. Eight years.

Q. Do you own that home?

A. No, sir.

Q. You rent?

A. Yes, sir.

[fol. 315] Q. Directing your attention to a place known as the Colony Club, do you know where that place is located?

A. Yes, sir, 29th and Western.

Q. 29th and Western?

A. Yes.

Q. That is in the city of Los Angeles?

A. Yes, sir.

Q. About how far is that from your home?

A. I imagine it is about twelve blocks.

Q. Now, directing your attention to the Colony Club, were you in the Colony Club some time between the 10th and 14th of August, 1944?

A. Yes, sir.

Q. Directing your attention to the defendant in this case, Dewey Adamson, who is seated at the end of the counsel table, did you see him in there?

A. Yes, sir.

Q. Some time between the 10th and the 14th of August?

A. Yes.

Q. What time of day or night would you say that you saw him in the Colony Club?

A. Well, it was before dark; I imagine it was around 6 or 6:30, some time along there; it was in the early part of the evening.

Q. Were you present at some conversation between the defendant and some other person wherein a diamond ring [fol. 316] was mentioned?

A. Yes, I overheard him ask some man if he would be interested in—

Mr. Safier: Just a minute. I think the question has been answered, your Honor, and I move to strike the voluntary answer.

The Court: After the answer "Yes" we will let the balance of the answer go out at the present time.

By Mr. Roll:

Q. Where did this conversation happen, what place?

A. In the Colony Club.

Q. Where in the Colony Club?

A. At the bar.

Q. Where were you at the bar?

A. I would imagine it would be maybe the third stool from the door.

Q. Where was the defendant, Adamson?

A. Sitting on my righthand side, that would be.

Q. Where was this man he was talking to?

A. He was seated on the other side of Mr. Adamson.

Q. What was the conversation?

Mr. Safier: Objected to, your Honor, no proper foundation laid.

The Court: What foundation?

Mr. Safier: Well, persons present—

A. Well, I just happened to overhear—

[fol. 317] The Court: Wait a minute. There isn't any rule that requires you to have all parties present at the conversation named, and there does not need to have been any person present, as far as that is concerned. You may proceed.

By Mr. Roll:

Q. Go ahead and relate the conversation so far as it pertains to the diamond ring.

A. Well, I just happened to overhear him ask this man if he would be interested in buying a diamond ring. He really wasn't talking to me. I don't know why I did hear it.

Q. What, if anything, did the man say?

A. He said no, he was not interested.

The Court: I did not hear it, Mr. Reporter.

(Answer read.)

By Mr. Roll:

Q. Who was it that asked the man if he would be interested in buying a diamond ring, who asked that?

A. Who asked that? Dewey.

Q. Dewey?

A. Yes.

Q. That is this defendant here?

A. Yes, sir.

Mr. Roll: Cross examine.

Cross examination.

By Mr. Safer:

Q. This Colony Club to which you have reference is run [fol. 318] by and frequented by colored people, is it not?

A. Yes, it is.

Q. Was that the first time you had been in there, or had you been in there on other occasions?

A. Well, I had been in there off and on for the last eight or nine years.

Q. Did you know Mr. Adamson before?

A. Just by him coming in there. I was never really acquainted with him.

Q. Did you know his name?

A. Nothing more than just hearing people call him "Dewey." I didn't know the rest of his name, his last name.

Q. On how many occasions had you seen Mr. Adamson in the Colony Club prior to the occasion to which you have now testified?

A. I do not believe I saw him there more than four or five times.

Q. Four or five times. Now, what date was it that this conversation took place?

A. It was between the 10th and 14th of August.

Q. How do you fix that time?

A. Well, because I have a friend who I talked to yesterday and day before yesterday, too, that more or less brought it to my mind about the time that it would be through the hours that he works.

[fol. 319] Q. Now, you mean you fix the time as being between August 10th and August 14th of this year because some friend of yours told you that that was the time?

A. Yes.

Q. You have no independent recollection of when it was?

A. Well, I knew it was around about that time but I did not know just exactly what time, whether it was around the 1st or the 10th or 14th. It was the first two weeks of August, that is all I knew, until I talked to Mr. Gaines.

Q. You are positive it was some time in the first two weeks of August?

A. Yes.

Q. Do you remember what day of the week it was?

A. No, I don't remember that.

Q. Could you state whether or not it was a week day or whether on a Sunday?

A. It could have been Tuesday or a Thursday; it could not have been on Wednesday, because they are closed on Wednesdays.

Q. I see. And you were sitting at the bar, were you?

A. Yes, sir.

Q. Were you drinking?

A. I had a few glasses of beer but I had not even been served beer at the time that I heard the conversation. I had just come in.

Q. You just came in?

[fol. 320] A. Yes.

Q. And you had not had anything to drink at all?

A. I had not been served a beer yet, no.

Q. How long did you remain in the Colony Club that evening?

A. Oh, I imagine an hour or an hour and a half.

Q. How many drinks had you had during that hour or hour and a half?

A. I probably had five or six drinks.

Q. Five or six drinks of what?

A. Glasses of beer.

Q. Did you remain at the bar all of that time?

A. Yes, sir.

Q. Was Mr. Adamson at the bar too?

A. He was at the bar when I went in, yes, sir.

Q. Now, did you hear this conversation when you first went into the Colony Club, or had you been in there some time before you heard it?

A. Well, they had been talking, evidently, before I came in. I mean, I didn't even know how I happened to even listen to it. I just sat down like anybody would, and they were talking, and there wasn't very many people in there and it is not so hard in a little place to overhear conversation, not that I was listening for anything.

Q. Was Mr. Adamson already in the Colony Club when you arrived?

[fol. 321] A. Yes, sir.

Q. And when you walked into the Colony Club did you come in alone or were you with somebody?

A. I was alone.

Q. Where was Mr. Dewey seated when you came in?

Mr. Roll: Just a moment, if she knows. That assumes something not in evidence.

The Court: Overruled. You may answer.

[fol. 322] A. Well, I would say he probably would have been on either the fourth or fifth stool; it could not have been any further back than that, because I know I could not have had any more than maybe the third stool myself on the bar as I walked in.

Q. You did see Mr. Dewey sitting there when you first entered, didn't you?

A. Oh, yes, yes.

Q. Were there other people seated at the bar, too?

A. There was an elderly man that we call "Tim." I don't know what his name is.

Q. A white man or colored man?

A. A white man.

Q. Other than Mr. Dewey and this man that you called "Tim" was there anybody else seated at the bar when you came in?

A. Well, there could have been. There wasn't very many people in the place. I think there was, away up at the other end of the bar perhaps a couple of men seated up there.

Q. How long a bar is it?

A. I would not say whether one or two. I don't believe I looked up there.

Q. I see.

A. I didn't pay much attention, I mean.

Q. Well, you sat down at a stool at the bar then, didn't you?

[fol. 323] A. Yes, sir.

Q. How many stools were you away from Mr. Adamson?

A. I had the one next to him.

Q. You sat on the stool next to Mr. Adamson?

A. Yes, sir.

Q. Where was the man to whom Mr. Adamson was talking?

A. He was on the other side of Mr. Adamson.

Q. And was this other man a white man or a colored man?

A. He was a colored man.

Q. Do you know his name?

A. No, I never saw him before.

Q. You never saw him before. About how old a man did he appear to be?

A. Well, I suppose around about thirty-five, maybe.

Q. How was he dressed?

A. I do not believe I remember.

Q. How was Mr. Adamson dressed?

A. I don't believe I can remember that.

Q. Was Mr. Adamson wearing a hat?

A. Yes.

Q. Was the other man wearing a hat?

A. Yes, I believe he was, yes.

Q. Was there anybody else in the Colony Club that you knew when you arrived there that evening?

A. No, just this man that we call "Tim" and Eddie and his wife that own the place. I don't know their last names.

[fol. 324] Q. They are colored people, too, aren't they?

A. Yes, sir.

Q. Was there any entertainment there that evening, some band playing?

A. No, they have no orchestra or anything like that; just a music box.

Q. Was the music box,—was there some music coming from the music box?

A. I don't remember of any, no.

Q. You don't remember. Now, how long prior to that particular evening had you seen Mr. Adamson?

A. Oh, maybe a week or ten days.

Q. I see. Could you be mistaken about it being Mr. Adamson that you saw at the Colony Club that night?

A. No, there is no mistake about knowing him.

Q. No, I did not ask you if you are mistaken about knowing him. I asked you if you may be mistaken about he being the man you saw at the Colony Club that evening?

A. No.

Q. You could not be mistaken?

A. No, I am positive it was him.

Q. Was he wearing a mustache at that time?

A. No, I don't think so—I don't know.

Q. Well, on the other occasion that you saw him prior to that particular evening was he wearing a mustache or not?

A. Yes, I believe he had just a very thin mustache.

[fol. 325] Q. But that particular evening he did not have any?

A. I don't know; I did not observe him that much, I wasn't—

Q. Are you able to say as to that particular evening that you had that conversation whether Mr. Adamson was wearing a mustache or not?

A. He probably was. I can remember that he has had a mustache.

The Court: Can you tell, looking at him now, whether he has a mustache from where you are looking at him?

A. I really never observed the man enough; I was never interested.

The Court: Look at him right now and tell me whether he has a mustache right now or not.

A. It doesn't look like it from here.

Mr. Safier:

Q. You say it doesn't look like it from where you are seated?

Mr. Roll: Will you read the answer, Mr. Reporter?

(Answer read.)

By Mr. Safer:

Q. You were a lot closer to him that evening at the Colony Club than you are now, were you not?

A. Yes, sir.

Q. How many feet away from him were you at the Colony Club that evening?

A. The width there is between two stools.

Q. Well, how far in feet to the best of your judgment?

[fol. 326] A. I did not hear your last question, I am sorry.

Q. In feet how far was it to the best of your judgment?

A. Well, it was about a foot and a half; I do not think it is even two feet the stools are apart; I am not sure.

Q. About a foot and a half?

A. I would imagine so.

Q. You can't tell me whether he had a mustache on that evening or not?

Mr. Roll: I object to that as asked and answered.

The Court: Sustained.

Mr. Safer:

Q. All you heard Mr. Adamson say was "Do you want to buy a diamond ring"?

A. Yes.

Q. The other man said he did not; is that correct?

A. That is right.

Q. You did not see any diamond ring?

A. No.

Q. Did you just take one glance at Mr. Adamson that evening or were you sitting there watching him?

A. Well, he was more or less talking to this man. He simply spoke when I sat down, he just said, "Hello, Frances" and I said "Hello" and was talking to Tim. [fol. 327] In fact, my back was turned, really, and I would not say turned to—I was facing Tim and my back would be to Dewey, because I was talking to him and he was talking to this, whoever the man was; I didn't know the man.

Q. He said, "Hello, Frances"?

A. Yes. Most everybody up there knows me and speaks.

Q. Have they a juke box in that Colony Club?

A. Yes.

Q. Do you remember whether that was playing at that time?

A. No.

Q. You don't remember, or it was not playing?

A. They play it and do not play it; that is something I don't pay much attention to. I am always glad when it doesn't play because I don't care for the records.

Q. Can you tell us whether it was playing at that time or not?

A. No, I don't believe it was.

Q. You don't believe it was. Who is this party you called up to refresh your recollection about dates?

A. Mr. Harold Gaines.

Q. Was he with you on that evening?

A. No.

Q. Who left the club first, you or Mr. Adamson?

A. Mr. Adamson.

Q. How long after you came in there—strike that. How [fol. 328] long after you had this conversation did Mr. Adamson leave?

A. I don't believe I know. I don't believe I paid any attention to when he walked in or walked out. Several other people came in after that and people would get up and leave, and sit down. I really don't know.

Q. Was that all the conversation you overheard?

A. Yes.

Q. As a matter of fact, you are not even sure that you heard that, are you?

A. Yes, I am pretty sure I heard it.

Q. You are pretty sure?

A. Yes, sir.

Mr. Safier: I have no further questions.

Mr. Roll: That is all.

The Court: That is all.

Mr. Roll: May this witness be excused?

The Court: Yes, you may be excused.

Mr. Roll: Does your Honor want to take the recess now?

The Court: Well, I think we will take our recess at this time. We have reached our recess time. The jury will keep in mind you are not to talk about the case or form or express any opinion. Take a recess until tomorrow

morning at 9:30. All witnesses are instructed to return at 9:30 tomorrow morning.

(Whereupon an adjournment was taken until Friday, November 17, 1944, at 9:30 o'clock a. m.)

[fol. 329] Friday, November 17, 1944; 9:30 O'clock A. M.

The Court: Let the record show the jury, counsel and defendant present in the case on trial. You may proceed.

Mr. Roll: I wonder, if your Honor please, with your Honor's permission, if we could take the little diagrams off the board and erase the little sketch?

The Court: Yes, that might be done.

Mr. Roll: Then when we get the easel we can put them on that.

The Court: By the way, those diagrams have not been offered in evidence as yet.

Mr. Roll: I will offer them in evidence.

The Court: Marked 1 and 2 in evidence.

Mr. Roll: Mr. Larbaig.

JOHN B. LARBAIG, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. John B. Larbaig, L-a-r-b-a-i-g.

Direct examination.

By Mr. Roll:

Q. Your name is John B. Larbaig?

A. That is correct.

[fol. 330] Q. Mr. Larbaig, you are attached to the Los Angeles Police Department; is that true?

A. I am.

Q. How long have you been in the Los Angeles Police Department?

A. Nineteen years and ten months.

Q. What is your duty at the present time?

A. Scientific investigation division in the fingerprint detail.

Q. How long have you been in that particular detail?

A. Approximately thirteen years.

Q. Mr. Larbaig, prior, we will say even to going into that particular detail and during the time you were in there, have you made any study of fingerprints, fingerprint comparisons and fingerprint classifications?

A. I have.

Q. Will you state to the court and jury what study you have made, what books you have read, if any? Will you do that, please?

A. I have read numerous books on fingerprints such as Henry in Classification; Kuhne on Prints, Batley and Larson on Single Fingerprints.

The Court: Mr. Larbaig, pardon me. It might be of some interest to the jury if you will just, in a few words, tell us the difference between the Henry System and the Larson System.

[fol. 331] A. The Henry System is the classification of the complete set of fingerprints, in other words, the impression of each separate finger, including your right and left hand; the classification of all those fingers combined is the Henry System. The Larson is the classification of one single print.

The Court: In other words, if you found one single print and are trying to find it in your records, it would be rather difficult to find it under the Henry System, but under the Larson System you could?

A. That is correct.

The Court: In other words, you could more readily?

A. Yes, much more.

The Court: You may proceed.

By Mr. Roll:

Q. Now, in addition to reading those books have you attended lectures and taken any educational courses?

A. I attended several lectures and schools for a short period of time, one put on by the Federal Bureau of Investigation, a monthly periodical that they send out on fingerprints.

Q. Now, with reference to the time you have spent over there in the Police Department, working on fingerprints, how long has that been?

A. Approximately thirteen years.

Q. And you have testified in court a number of times on [fol. 332] fingerprints; is that correct?

A. I have.

Q. Fingerprint comparisons, is that true?

A. That is true.

Q. Now, will you explain to the court and to the jury, Mr. Larbaig, first, what you mean when you use the words "latent fingerprint"?

[fol. 333] A. Well, the word "latent" originally is that it is invisible. In other words, a latent print—it is an impression of your fingers left on a fairly clean surface. In some instances it is visible, such as glass or something like that, that you can hold up and you can readily see the moisture that your impressions have left there. But on some surfaces it is invisible, and thereby derives the word "latent." It is invisible in the majority of cases until developed by some kind of a powder.

Q. All right. Will you tell us with reference to the leaving of a fingerprint by touching certain objects, such as a clean surface, such as a fairly clean surface, what actually leaves the impression of the fingerprint on there? What is there about the fingers or the glands or anything along that line that actually leaves the impression of the prints on there?

A. Yes. The fingers or hands are so constructed that on the ridge portion of your hand there is a series of sweat glands or ducts, so-called, and that perspiration is mostly always—in general cases it is—comes through these pores and there is an oily substance, a natural substance that is exuded from the body that is always left on your hands, and when you touch this surface, fairly clean surface, you leave that perspiration and that oil on that surface.

The Court: You refer to some ridges. Will you just [fol. 334] tell us a little more about it? This may be new to some of the ladies.

A. Well, the construction of, I would say, the area that we call the prints that we use, contains ridges, little fine ridges and also depressions. In other words, you have your valleys and mountains. Your ridges represent the mountains, and then there is a valley in between your ridges.

By Mr. Roll:

Q. When you leave an impression by touching an object what actually—what part of the finger makes the impression?

A. The ridges.

Q. And the valleys will show after the picture is photographed, after the print is photographed, as white spaces, is that true?

A. That is true. If it is developed with black powder the ridges will show black, and the depression part, the valleys, will show white; that is, the same color as the background.

Q. With reference to fingerprint patterns, that is the patterns in the fingers themselves, generally how many different types of finger patterns are there?

A. Well, in general type we have—there are four distinct patterns. We have one called the loop, whorl, arch and tented arch.

Q. There are different kinds of loops. In other words, you take and break a loop down, isn't that true?

[fol. 335] - A. We have two distinct loops. We have one called the ulnar loop and one called the radial loop.

Q. With reference to some of the other general classifications are they also broken down?

A. Yes, the whorls,—yes, your whorls are broken up in quite a few. You have different types of whorls.

The Court: You have another classification covering the unusual case?

A. The composite patterns. That includes one or more patterns, but it is classified as the whorl.

Mr. Roll: May I have your Honor's permission to erase that?

The Court: Yes. That is there just for a temporary illustration. Let the record show the drawing made by Mr. Maurer as representing the possibility of lifting the shelf in the so-called garbage compartment was not offered in evidence, and has been erased.

By Mr. Roll:

Q. I wonder, Mr. Larbaig, if you would step to the blackboard there and with this crayon draw on the blackboard—give us an illustration of the four general patterns,

that you have mentioned in your testimony, and make it large enough so we can see it down here, if you will?

(Witness draws on blackboard.)

Q. Will you explain what you have put on there? You put something there; will you explain what it is?

[fol. 336] A. These are called a loop pattern print; they come up and loop, and this most central portion is called the core, and the pattern area tends to go up around that and loops and right back in the direction where your ridge started out from. If it appears on one hand, in the right hand, it is a radial loop, and if it appears in the left hand, it is called an ulnar loop; and the reverse to this one over here; this is a loop in the other direction. If appearing in the right hand it is an ulnar loop and if it appears in the left hand it is a radial loop.

[fol. 337] The Court: The reason for calling them that, one slants toward the radius and one slants toward the ulnar bone?

A. The radius and ulnar bone. In the right hand the ulnar loop slants to the right or toward the ulnar bone, and in the left hand it slants to the left, which is just the reverse, the ulnar bone being on the outside of the arm. In the radial loops, such as the one on the left, if appearing in the right hand it slants in the opposite direction.

The Court: I think that covers it.

A. This type is known as the whorl type. It has what, in fingerprint terms, it must have what we call two deltas to consist of a whorl, but the general pattern just circles and goes around the centermost portion of this, which is the core. It tends to go around that area. Those are all classified as whorls. There are several different patterns of whorls but this is the most general type.

By Mr. Roll:

Q. Mr. Larbaig, before you move on to your next one; will you be kind enough to take the two blue patterns you have shown on the board, the right ulnar—will you mark out where the cores are there? Just put an arrow up and put a "C" on it.

(Witness does as requested.)

Q. Will you do the same thing with reference to the whorl?

[fol. 338] (Witness does as requested.)

Q. Now, you mentioned also on the whorl that there are two deltas. Can you come down with some letters, with a "D" and show that?

(Witness does as requested.)

Q. What do you mean when you say "delta"?

A. Well, it is in illustrations in books, it is the same as you have your delta, it is the term the same as you have in your rivers. Your portion of land which is out in the middle of that they call the delta of that river, and these ridges, when they tend to flow from one side to the other side of that portion in between there, right here, that is called the delta for fingerprint classification. We also have in this portion here, this part here is called the delta on the loop pattern print.

Q. All right, if you will go ahead with your next one.

A. This type of pattern is just about all the name implies, they just arch out from one side of your finger to the other. That is known as the arch pattern.

Q. Before you get over there, have you shown enough of that arch pattern to show where the core will be in that?

A. There are no cores or deltas in your plain arch pattern. All your other patterns, your ridges come out from one side of the finger and arch over and go right out through the other side. Then the tented arch, almost the same thing takes place and the centermost portion of the [fol. 339] pattern appears in that respect. This is termed, as your tented arch.

Q. Now, in a tented arch is there a core?

A. Not necessarily, no, but you could term this part here—there is no ridge counting or anything else in fingerprint classification as to your arches, but it is the centermost portion of that print would be termed as that. We never do it, we do not have to count ridges on them.

Q. Those are the four general patterns you mentioned in your testimony, is that correct?

A. That is correct.

Mr. Reil: If you want to resume your seat, unless your Honor has some further questions.

The Court: No, I think he has fairly well covered the preliminary matters.

By Mr. Roll:

Q. Now, Mr. Larbaig, with reference to fingerprint work and making fingerprint cards for filing with the Police Department, the Sheriff's office or the Federal Bureau of Investigation, or some of the industrial plants that use them, will you tell us how a fingerprint card is made? Just a second—May I have one of the cards there, please? I think probably I will withdraw that.

I have here, Mr. Larbaig, two cards which I ask be marked for identification at this time.

The Court: Our next number is 22.
[fol. 340] Mr. Roll: I will ask that the one be marked, the one which is indicated as being taken at 2:10 be marked No. 22, and the one which is indicated as being taken at 2:12 be marked as 23. I will put a circle around the number.

Q. Now, I show you here two cards, Mr. Larbaig. Will you state what those cards are?

A. They are rolled impressions, inked impressions of the defendant, A. D. Adamson.

Q. Did you, yourself, actually take and roll the prints of the defendant, A. D. Adamson?

A. I did.

Q. With reference to People's Exhibit No. 22 for identification on what date and at what time and where was People's Exhibit 22 made?

A. They were rolled on August 31, 1944, at 2:10 p. m. in the county jail.

Q. And with reference to People's Exhibit No. 23, when was that rolled?

A. On August 31st, 1944, at 2:12 p. m. in the county jail.

Q. Will you tell us, Mr. Larbaig, what equipment you use to roll, as you say, the prints of an individual?

A. We use a roller, that is a small rubber roller, with a roll the diameter of which is about an inch, and a glass slab or plate approximately a foot and a half long, 6 inches wide, and printer's ink.

[fol. 341] Q. Will you illustrate by the card, Mr. Larbaig—I will now offer these two cards into evidence, if the court please, 22 and 23.

The Court: They will be marked 22 and 23.

Mr. Roll: Will you step right up here?

The Court: You might have Mr. Larbaig explain as he goes along what he does, starting with the material he has given what he does with the inks and the material.

Mr. Roll: That is what I would like to have you do. If you want to use my hand, assuming you have to put the substance on it, you can do that if you want to do it.

A: First of all, the ink comes in tube form, and a little bit of it is squeezed out onto this slab. It is rolled up evenly and smooth onto this glass plate we have, rolled out even. Then the procedure is first, as you see in the upper, and in the next row these represent the right hand and these the left hand. These are rolled impressions which I will show you how they are obtained. They are taken, one set on this slab, and rolled all the way over there and then placed on this card, and in the same motion rolled from one side to the other. All ten of these are put on in that respect. Now, we have the prints on the bottom. These prints are called plain impressions. These impressions are taken by placing the fingers simultaneously on this plate and taken and put right on the card in that manner, not rolled, they are just plain, and also with the left hand, [fol. 342] and they are, with the thumb, just placed right down onto it and then picked up and placed where they stay.

Q. Now, Mr. Larbaig, with reference to doing what you call rolling prints, such as you have just described to the jury, in so far as the condition of cleanliness of the hands and the condition of the ink on the hands, will you state to the court and jury what practice you use in that connection?

A: Well, to get a good impression, the hand should be fairly clean.

Q. Now, with reference to what we have determined to be a latent print, a latent print is one that, from your description, is left on some object, and is left there by reason of the construction of the fingers and the oily substance on the fingers, that is correct, isn't it?

A. That is correct.

Q. Depending on the nature of the surface upon which the print is left, and depending upon the condition of the

hands, to some degree, depends the result as to the clarity of the print; is that correct?

A. That is correct.

Q. Will you explain that a little more in detail, please?

A. If the surface that we are attempting to develop a fingerprint from has a certain amount of foreign matter on it, such as dust or grease, or something to that effect, [fol. 343] well, our print that we develop will not be termed as very good, but on a good, clean surface, where this foreign matter does not exist, why, the print will come out, practically as good as the rolled ink impression.

By the Court:

Q. What would be the effect, Mr. Larbaig, of foreign matter on the fingers that touched a surface?

A. If foreign matter on a finger would touch that surface, why, it would not leave an impression in that area that this foreign matter was on, for the reason that—say, the portion of the finger was covered with a slight coat of dust and placed upon this surface, the dust stuck to the finger would absorb that moisture; when placed up there it wouldn't leave anything beyond the point of that dust. In other words, this would only get a portion of the print, or would keep it from going onto that other surface.

By Mr. Roll:

Q. Now, Mr. Larbaig, I do not want to go into all the details of fingerprint classification—I don't want to spend a lot of time on that subject, but will you tell us, generally, what is meant by fingerprint classification?

A. You are referring to the full classification of the full ten fingers, or just of a single print?

The Court: Just take—I think what Mr. Roll is getting at is, in other words, you ultimately arrive, after you have taken a fingerprint, at a sort of fraction, it looks like a [fol. 344] fraction, at any rate, a number, which is a classification number. Generally, what is that based on? In other words, what I am trying to get at, what valuation is given to the separate prints, without going into too much detail?

[fol. 345] A. Well, our first step—right at the present time we have so many different extensions—but our first,

primary step is where—this second one with reference to the whorl pattern that I drew on the board—it all depends upon which one of these ten sections of this card, as to where it appears—wherever they appear in any one of these sections, they have a numerical value, and that will arrive at your primary classification, such as we have a classification that starts at one over one. In that classification there is a known type of this whorl pattern in any one of the ten fingers, that is what we classify as one over one. But if the whorl goes down—appears in any one of these, it will start one over two or one over three, clear up to classification 32. That means 32—you have a whorl in half of the fingers, and we come up to where we have 32 over 32, we have a whorl in every finger.

Q. Let me ask you this question—I think it probably will simplify it. Suppose you had here, Mr. Larbaig—we will take some one roll my prints here in the courtroom, and that my fingerprint card, one like you have got there, was over on file in the police department; now, that card was sent over to the police department, that was rolled here, with no name and nothing on it; what steps would they take to find out whose prints they were over in the police department?

A. It would be classified just as I got through stating, [fol. 346] in what we term as primary, secondary, sub-secondary and final counts, classified in that respect, and search through the file and we arrive at the different patterns as to their valuation, counting of the ridges that intervene between the delta and the core. In this one instance we would count from right to left, and in this one from left to right. Then, the whorls, there is no ridge counting, but it is tracing. We trace from this delta to the delta on the opposite side. If it only had two deltas, we would arrive then as to whether it would mean a certain thing in our classification.

Q. Now, in the example I gave you, the card that was already on file over there in the police department, if I understand from your previous answer, Mr. Larbaig, would be filed over there under a certain classification; is that correct?

A. That is correct.

Q. That is, you would classify the print that was sent over there, look into the file, and then make a comparison between the one in that file and my finger; is that it?

A. That is correct.

Q. When you use the term comparing fingerprints, what do you mean by comparing fingerprints, generally?

A. Well, in the group of ten we compare patterns. When we get down to one print, it is to find similar prints of identity.

[fol. 347] Q. Now, with reference to this situation, Mr. Larbaig, counsel yesterday asked Mr. Ferguson, the gentleman that testified to taking some photographs there of fingerprints, if he made an examination of the body of the deceased for prints. Now, I will ask you if you could get fingerprints off the body of a person?

A. No, not with modern methods, no, sir.

Q. In other words, the only fingerprints you could get off would be the fingerprints of the deceased; is that correct?

A. Yes, sir.

Q. In other words, if I come up and touch you I do not leave any fingerprints on you?

A. No.

Q. Counsel also asked Mr. Ferguson if he made an examination of the coat on the body for prints. Now, can you take an object like a coat, such as I have, some garment, cloth, and take fingerprints off of that?

A. Not a print that could be identified, no sir.

Q. Take an electric cord, similar to the one we have here, the one which is in evidence—may we have that?

The Clerk: Which is it?

Mr. Roll: The electric light cord.

The Court: No. 5.

(Exhibit No. 5 handed to Mr. Roll by the clerk.)

By Mr. Roll:

[fol. 348] Q. People's Exhibit No. 5 If I touch that, can you get a fingerprint off of that?

A. No, sir.

Q. How about an object like this blotter here, can you get a fingerprint off of that?

A. No, sir, you cannot.

Q. Mr. Larbaig, I am going to show you here People's Exhibit No. 20, which has been introduced into evidence. I will ask you to examine People's Exhibit 20 and state whether or not you have seen People's Exhibit 20 before?

A. I have.

[fol. 349] Q. Will you examine People's Exhibit No. 19-A, B and C, the three photographs there, and state whether or not you have seen these before?

A. I have.

Q. Now, Mr. Larbaig, did you cause to be made what we may term some blown-up photographs or enlargements from the negatives of People's Exhibit No. 20?

A. I did.

Q. Do you have those in your possession at this time?

A. They are right on the desk in front of you.

The Court: By the way, while Mr. Roll is getting those, those photographic enlargements are made the same way that a photographer makes an enlargement when you take a little snapshot which we like, a particular picture that we want, and take one for our home from the print?

A. That is true.

By Mr. Roll:

Q. Now, do you have in your possession at this time—we will start with People's Exhibit 19-C—an enlargement of People's Exhibit 19-C?

A. I have.

Mr. Roll: Now, I will ask that this enlargement of People's Exhibit 19-C be marked People's exhibit next in order.

The Court: 24.

By Mr. Roll:

Q. Now, with reference to this enlargement of 19-C, the print which is shown there is what portion of People's [fol. 350] Exhibit 19-C? Will you indicate that, please? Just point out.

A. Is the centermost portion—

Q. If you will just bring that down so we can have it shown to the jury—take the little picture there—if I understand your testimony, this photograph here is an enlargement of this print here in People's Exhibit 19-C; is that correct?

A. That is correct. The dark area is the top.

Q. I will repeat that again. If I understand, this portion I am now pointing to on People's Exhibit 19-C is enlarged and shown in this Exhibit No. 24; is that correct?

A. That is correct.

Q. All right. Now, Mr. Larbaig, did you take and make any enlargements of either People's Exhibit 22 or People's Exhibit 23?

A. I had one of the impressions of People's Exhibit 22 enlarged.

Q. Do you have that picture with you?

A. I have.

Q. May I see that one, please?

(Witness hands Mr. Roll a picture.)

Mr. Roll: I will ask that that be marked People's exhibit next in order.

The Court: 25.

By Mr. Roll:

Q. And of what finger—this shown in People's Exhibit [fol. 351] 25 is an enlargement taken from this card here?

A. It is the center one in the upper row.

Q. This photograph here is an enlargement of this finger of the right hand; is that correct?

A. Yes.

Q. This is one of the rolled impressions that you took of the defendant, that you testified concerning?

A. That is correct.

The Court: Well, while we are at it, which finger it is?

A. It is the right middle finger.

By Mr. Roll:

Q. This finger here (indicating)?

A. That is correct.

Q. Now, Mr. Larbaig, after making these enlargements, People's Exhibit 25,—after these enlargements were made, People's Exhibits 24 and 25—withdraw that. Have you made a comparison, Mr. Larbaig, between the print which is exemplified by People's Exhibit 19-C, that being the print that Mr. Ferguson testified was on the inside of the garbage door—

Mr. Roll: May I have that door, please?

(Exhibit referred to handed to Mr. Roll.)

Q. My recollection is that Mr. Ferguson testified that People's Exhibit 19-C is a photograph of this finger print

on the door, which has been marked in evidence. Now, I will ask you—

[fol. 352] The Court: The inside metal portion of the door.

Mr. Roll: Yes, your Honor.

Q. I will now ask you if you have made a comparison between that fingerprint which is exemplified by the fingerprint on Exhibit 19-C and any fingerprint which appears upon Exhibit 22, being the fingerprint card which you rolled of the defendant on the 31st day of August, 1944, at 2 p. m.

A. I did.

Q. What conclusion did you come to after making that comparison?

A. In my opinion, the print on the photograph marked 19-C and one of the prints on People's Exhibit 22 were both made by the same finger, which is the right middle finger of the defendant, Adamson.

Q. Now, in order to be able to present this matter to the court and jury, did you cause to be prepared these enlargements, People's Exhibit 25 and People's Exhibit 24, of these two fingers that you have just testified concerning?

A. I did.

Q. And I notice on these two prepared ones you have some red lines. Will you indicate just generally, first, what the purpose of the red lines is?

A. The red lines are pointing out the points of identity, similar points of identity. They are marked out on both, [fol. 353] the enlargement of the rolled ink impression and the one print that was photographed on the door, the marks, which are fifteen in number, indicating fifteen points of similarity in these two prints.

Q. Now, in fingerprint work, when you are making a comparison of one known print and one unknown print, before you come to the conclusion that they are the prints of the same individual, how many points of identity, under the American system, are necessary, a minimum?

A. Well, the modern, up-to-date book of today says it should be at least twelve, ten to twelve.

Q. From ten to twelve?

A. Yes.

Q. You have on this comparison, putting it in red ink, fifteen; is that correct?

A. That is correct.

Q. At there, without going into some of the others, if an individual were to stop and make an additional study, would there be some other additional points of identity?

A. There are additional—

Mr. Safer: Just a minute. Unless he has made an additional study, that calls for a conclusion.

The Court: May I have the question?

(Question read.)

The Court: I think the question should be reframed. Sustained.

[fol. 35] By Mr. Roll:

Q. Are there additional points besides the fifteen?

A. There are.

Q. You come down here—I will hold one and you hold the other, and point out to the jury, as best you can—I will hold one and you hold the other—hold it up so the jury can see—which one do I hold in my hand?

A. That is an enlargement of the rolled ink impressions that I took of the defendant. The points of identity are marked in the same way on each side of the prints; I have them numbered. Each one indicates what is being placed there in the ridge area. Point No. 1 is a forking ridge, meaning that one solid ridge splits and then goes on its own course.

Q. This (indicating) is what you are indicating when you are speaking of that; is that right?

A. That is right.

Q. Right at this point, where you call it the forking of a ridge, is that evident in both of these exhibits which we have here in front of the jury?

A. Yes.

Q. Now, come down to No. 2. What does No. 2 show?

A. No. 2 shows the same thing, but it is inverted, the forking of a ridge. It is headed down in the other direction.

Q. Just bring that down here so we can see. Now, in [fol 35] this No. 1, you called that the forking of the ridge; is that correct?

A. That is right.

Q. The part I am indicating here is point and that same point—

A. The same point over on the righthand side.

Q. No. 2?

A. No. 2 is the central area, and that is inverted, forking of the ridge.

Q. All right, No. 3. Take No. 3, down in that section, and tell the jury what it is.

A. Point No. 3 is an ending of a ridge in between two solid ridges. It is an abrupt ending. Point No. 4—May I still go a step further on that one, ending in a downward direction.

Q. All right, point No. 4.

A. Point No. 4 is another abrupt ending ridge, ending in a downward direction; point No. 5 is also an abrupt ending ridge on the lefthand side of the pattern; it is also an abrupt ending ridge. One ridge away from that is also another abrupt ending ridge marked No. 6; point No. 7 is a bifurcation in the upward direction; point No. 8 is an abrupt ending ridge; point No. 9 is also an ending ridge. Point No. 10 is—

The Court: May I suggest something, gentlemen?

Mr. Roll: Yes, your Honor.

[fol. 356] The Court: I realize it is impossible to have the entire twelve jurors see the entire transaction. I wonder whether you could not give the ladies on the end a little break there and show them one or two of those items.

Mr. Roll: Move farther down here. Start with point No. 10, if you will.

A. Point No. 10 is an ending ridge, ending in the upward position.

Q. That is shown in both of the pictures?

A. Both of these; they are identically marked.

Q. Point No. 11?

A. Point No. 11 is an ending ridge, ending in the upward direction.

Q. Point No. 12?

A. Point No. 12 is a ridge, an ending ridge, in the upward direction.

Q. 13?

A. Point No. 13 is an ending ridge towards the center of the pattern in an upward direction.

Q. Point No. 14?

A. Point No. 14 is a bifurcation or a forking of the ridge in the center portion of the pattern, inverted.

Q. Now, you may have covered the reason for your opinion in going over these various points there, the fourteen points, but will you tell us again the reason for your opinion, when you said that the fingerprint, the photograph of the {fol. 357} one on the door, the back side of the door, of the right middle finger is the same print of the fingerprint card, the right middle finger of the defendant? Will you give us the reasons?

Mr. Safier: Just a moment. May I have that question read?

The Court: He asked for the reasons for his opinion.

Mr. Safier: Oh, I see.

A. My reason is mainly of these fifteen points of similarity that I have marked, some on the bottom side, some on the left, some on top and some on the right side, of all of these points of similarity in relation to one another.

By Mr. Roll:

Q. Now, with reference to the one which is the enlargement of the photograph which was made of the door, that is People's Exhibit No. 24, in so far as some of the area shown in there, and some of the ridges, that is not as clear as the photograph that represents the enlargement of the rolled right middle fingerprint, which is exemplified by People's Exhibit No. 25. Will you explain, in your opinion, the reason for the differences there of those two prints?

A. People's 25, the rolled inked impression is taken under ideal conditions, the finger is fairly clean and it is just rolled in this ink, but rolled on white paper, and it is under very ideal conditions and the print turns out fairly well, [fol. 358] but on the latent print developed on the back of that door you have foreign matter to contend with, which shows a darkened area on the top of this print which may have been grease of some kind or some foreign matter, and when the powder was applied it adhered to all that surface. There is also light surfaces in there where there probably wasn't much pressure of the finger applied there for the print appears dimmer.

Q. Mr. Larbaig, we have referred considerably here to

the several points of identity. What do you mean when you say "points of identity"?

A. Well, there are similar points of identity, which means that they are identical.

Q. In other words, the same thing shows on each of the two pictures?

A. The same thing shows on each picture.

[fol. 359] Q. Now, directing your attention to one of the other photographs which Mr. Ferguson testified concerning, being People's Exhibit No. 19-A, I believe that has been described as the outside of the inner garbage door, about 6 inches from the lower side. Did you cause to be made an enlargement of People's Exhibit 19-A?

A. I did.

Q. And do you have that here with you?

A. I have.

Q. And did you cause to be made—withdraw that. I now offer this as People's next exhibit, if the court please.

The Court: 26.

Mr. Roll: 26?

The Court: For identification.

By Mr. Roll:

Q. Now, did you cause to be made an enlargement of some fingerprints from the fingerprint card that you rolled of the defendant, People's Exhibit No. 22?

A. I did.

Q. And do you have that with you?

A. I have.

Mr. Roll: May this be marked People's Exhibit No. 27?

The Court: 27.

By Mr. Roll:

Q. I notice on People's Exhibit 26, on the righthand side, so the jury can see what I am indicating when I point, there appears to be two prints and then on the lefthand side a portion of a print down at the bottom and some up at the [fol. 360] top; is that correct?

A. That is correct.

Q. On People's Exhibit 27, being the one that you say is the enlargement of the fingerprint card that you rolled of the defendant, there are two fingerprints on that enlargement; is that correct?

A. That is correct. They represent the last two fingers in the upper row which represent the right ring and little finger.

Q: In other words, People's Exhibit No. 27 represents what again, now?

A. The right ring and little finger.

Q. All right. Now, Mr. Larbaig, I am going to ask you if you made any comparison between People's Exhibit No. 19-A and—that is the fingerprints there shown—and the fingerprints which appear on People's Exhibit No. 22?

A. I did.

Q. And what conclusion did you come to after making that comparison?

A. In my opinion the prints on photograph marked 19-A, and two of the prints on People's 22 are both made by the same fingers, which are the right ring and little finger of the defendant Adamson.

Q. Now, will you again indicate which two fingers on the card that is so the jury can see?

A. The next to the last and the last one in the upper [fol. 361] row.

Q. And when I say "a card", I refer to People's Exhibit No. 22. Now, in this instance did you prepare enlargements—withdraw that. You have testified, I believe, you prepared enlargements. Did you do this for the purpose of illustrating to the jury in this situation, points of identity?

A. I have.

Q. And on People's Exhibit 27 and 26, Mr. Larbaig, will you state how many points of identity you have numbered there? Just the total number is all I ask you for now.

A. There are fifteen in total.

Q. Are there more there that you have not actually numbered?

A. There are.

Q. Now, Mr. Larbaig, so that there may not be any question arise later on, on People's Exhibit 26 and People's Exhibit 27, I will hold this up,—maybe counsel would like to look at this also—is this photograph here, where you made your comparison and your opinion, is that the same finger that is shown here, the first, the one here center?

A. It is the one shown on the left or in the center of these other two.

Q. In other words, with reference to People's Exhibits 26 and 27, the picture shown, that is the print shown on the bottom side of 27 is the one approximately in the middle of 26 and the one shown on the righthand side of 27 is the [fol. 362] righthand one here; is that correct?

A. That is correct.

Q. I am not going to ask you to go through all the 15 points, Mr. Larbaig, but if you will take about two on this end of the jury, and two on that end of the jury in these prints, just pick out any two you desire, you call the number and I will point to it.

A. I have ten points of identity marked in the one on the righthand side. Point No. 1 is an abrupt ending ridge, ending in an upward direction.

Q. All right, now let's go on down here. Take point No. 1 again.

A. Point No. 1 is an ending ridge going in an upward direction, which is marked with the identical spot with the others.

Q. All right, take some other point and we will go down to this end.

A. Take point No. 10 on this same exhibit is an ending ridge; it is clear in the opposite direction, pointing down.

Mr. Roll: I will now offer into evidence, if the court please, these enlargements which have been previously testified concerning.

The Court: 24, 25, 26 and 27 are marked in evidence.

By Mr. Roll:

Q. I think that leaves us then, Mr. Larbaig, with 19-B, is [fol. 363] that correct? I think we have discussed the other two.

A. That is correct.

Q. Mr. Larbaig, did you make an enlargement of 19-B?

A. I did.

Mr. Roll: I will try this over again: The last print which Mr. Larbaig testified concerning, I believe, was indicated here by the letter A on the door, is that the one which you showed the jury?

A. That is correct.

Q. The one you are now going to testify concerning was indicated by the red "B" on the door?

A. That is correct.

[fol. 364] Mr. Roll: May this enlargement of People's Exhibit No. 19-B be marked 28?

The Court: Marked 28 for identification.

By Mr. Roll:

Q. Did you make an enlargement, Mr. Larbaig, of some of the fingers which are exemplified by People's Exhibit No. 22, being the fingerprints of the defendant which you rolled?

A. I did.

Q. And is this photograph which you now hand me an enlargement of some of the fingers on People's Exhibit 22, the prints you rolled of the defendant?

A. That is correct.

Mr. Roll: May that fingerprint card be marked People's Exhibit No. 29?

The Court: 29. You refer to it as a fingerprint card—

Mr. Roll: I am sorry, your Honor.

The Court: You mean enlargement from the fingerprint card.

Mr. Roll: Yes, your Honor.

The Court: All right.

By Mr. Roll:

Q. Now, Mr. Larbaig, with reference to People's Exhibit 22, we will take that one first; will you hold that up there, sir,—I will hold that, and will you hold the fingerprint card, People's 22, and indicate which pictures you are showing to be enlarged?

A. These three at the bottom with this number appearing [fol. 365] underneath.

Q. C-2554?

A. That is correct.

Q. And which hand is that, sir?

A. That represents the left index, middle and ring finger.

Q. Which hand?

A. The left hand.

Q. The left hand. All right. Now, did you make comparison, Mr. Larbaig, between the fingerprints which are depicted by 19-B, the one taken off the door, and the fingerprint card of the defendant, People's Exhibit 22?

A. I did.

Q. And what opinion did you come to concerning those fingerprints?

A. In my opinion, the fingerprints on photograph marked People's 19-B and several of the fingerprints on People's marked 22 are both made by the same fingers which are the left, index, middle, ring of the defendant, Adamson.

Q. Now, in order to illustrate that situation, you again made these enlargements; is that correct?

A. I did.

Q. On these enlargements you have made points of comparison; is that true?

A. I have.

Q. Now, we might again step down to the front of the [fol. 366] jury, Mr. Larbaig, hold these two exhibits—I have 29 and you have 28—so that we may have the record clear, that one I hold in my hand is the one from the fingerprint card that you rolled?

A. That is right.

Q. And this one is the enlargement of the one on the front of the door, at least one of them?

A. That is correct.

Q. Now, let's start over here on the righthand side of this one fingerprint over here. Now, I notice you haven't any points of identity marked on that. You are, I take it, not testifying that that particular print—there is nothing shown on People's Exhibit 28 to state that that is the same finger that appears on People's Exhibit 29?

A. That is true. I have it marked out in relation to the scar only.

Q. Mr. Larbaig, what is known as the smudging of a print?

A. Well, the main idea of the smudged print is a print that has been placed on a surface and then moved, causing it to smear, and when that is developed with the powder it will appear as just one black smear. That is termed as a smudged print.

Q. Now, what is known as slippage?

A. Yes, slippage.

Q. You can illustrate it.

[fol. 367] A. In the case of a door, a person lifting the door, you have a certain movement in this area of the finger when lifting a weight, which will cause this portion of your finger to roll, and you have to put quite a bit of pressure on there to keep it from doing that, and if the weight that you are lifting is not so heavy, why, you will have this portion

of the finger roll; which will cause what he terms a slippage.

Q. Well, is some of that done here?

A. Some of this, on these prints here, is shown as that, and also superimposed. In other words, there are portions of it just placed right over the top of the other, which causes it to be superimposed.

Q. That is People's Exhibit 28?

A. That is correct.

Q. We will start here again on the lefthand side—we had better start over here and then we will come on down. Will you pick out some points there, Mr. Larbaig, of the lefthand side?

A. Starting on the lefthand side?

Q. Yes.

A. On the print I have seven points of identical identity marked out, one referring to a small scar at the white area on—

Q. 29?

A. —29, and also shows as a white area in People's Exhibit 28. Point No. 1 shows as an abrupt ending ridge, ending in a downward direction.

Q. Now, if you want to come on down here, we can go over that scar again.

A. (Exhibiting to the jury) That light area shows injury to the ridge area which also appears on this one here as a light area.

Q. Now, if you want to take some other points, we will take the scar down here so they can see that.

A. The light area which appears on here is the scar, and also appears at point No. 7 on People's Exhibit No. 28. It also has six points of identity marked out as ridge characteristics that are similar.

Q. Now, do you want to take some other point down at this end?

A. Point No. 3 is a forking of the ridge in an upward direction. That is marked by point No. 3.

Q. And, I take it, without going through all of this matter again, Mr. Larbaig, you can point out with reference to the next point you have marked now?

A. There are eleven points of identity marked out on the print.

Q. With reference to the five you have marked out one on the left side. Are there more that you could point out?

A. There are.

Q. As many as ten altogether?
[fol. 369] A. yes.

The Court: This might be a good place to take our recess, Mr. Roll. We will take our morning recess. Ladies and gentleman, keep in mind the admonition heretofore given not to talk about the case or form or express any opinion.

(Short recess.)

By Mr. Roll:

Q. Now, with reference to the last exhibit which you testified concerning, Mr. Larbaig, will you give us your reason for your opinion that the prints which are shown by the photographs taken from the door and the prints that were—the portion of the prints rolled of this defendant, are prints of the one and the same person? Will you give us your reasons for that?

A. My reasons, the points of identity appearing in these positions with relation to one another, also with these scars appearing in the fingers, corresponding with those on the rolled ink impressions.

The Court: May I interrupt just a moment, Mr. Roll?

Mr. Roll: Yes.

(Short interruption on other court business.)

The Court: You may proceed, Mr. Roll.

By Mr. Roll:

Q. Now, Mr. Larbaig, with reference to the fingerprints of different individuals, that is, two different people; so far as known, have two different persons ever had identical fingerprints?

[fol. 370] Mr. Safier: Objected to as calling for a conclusion and opinion of the witness.

The Court: Overruled.

A. No, sir.

By Mr. Roll:

Q. Go ahead and explain that a little bit, if you will, please.

A. There is a possibility of one, two or maybe three points of similar identity. In other words, similar points appearing in a certain small area. But in comparing, like

I have marked out, fifteen in different portions of those patterns, and having similar points of identity appear in the areas all the way around of the patterns, I would say that it would be impossible to find similar points of identity on two different prints.

Q. With reference, Mr. Larbaig, to the diagrams which you put on there at the outset, with reference particularly to the loop and the whorl, what you have intended to depict there is merely what we call in those two—of the four types, the loop and the whorl, a portion of what we call the pattern area; is that correct?

A. That is correct.

Q. That is, around the center of the finger above the joint, you haven't gone out, as you have on the arch or the tented arch?

A. I have not.

Q. Now, so we can have it reproduced later on, will you [fol. 371] come down here and with this chalk—I have attempted to put two rectangles on the board for the purpose of indicating the back or metal side of the door and the front side of the door. Now, take one little diagram there, if you will, and approximately show where this print, which you have testified to, was up in here.

(Witness draws on backboard.)

Q. Now, which print and of what hand, according to your comparison, is depicted there?

A. I identify the one on the back side of the door or metal, as the right middle finger.

Q. All right. Now, taking the other side, will you do the same thing with reference to the front side of the door, show what fingers of the defendant you identify as being on the front side?

A. These representing the hinges and this the knob on the door.

Q. You have got the hinges, I think, in the wrong place.

A. Yes.

(Witness drawing on diagram.)

That is the left index, middle and ring fingers.

Now, take the other side.

A. I have identified it as the right ring and little finger of the right hand.

Mr. Roll: You may cross examine.

[fol. 372] Cross examination.

By Mr. Safier:

Q. Mr. Larbaig, you are connected with the Los Angeles Police Department; is that correct?

A. That is correct.

Q. How long did you say you had been with the Los Angeles Police Department?

A. 19 years and ten months.

Q. Had you done any fingerprint work prior to the time you became associated with the Los Angeles Police Department?

A. I did not.

Q. What courses did you state on direct examination you took in fingerprint study? You testified to some courses, did you not?

A. Well, no, not any specific course. I have taken a short course by the Federal Bureau of Investigation that lasted over the period of a week.

Q. A week?

A. Yes.

Q. When did you take that course?

A. Not very long ago. It was just—I would say it has been within the last six months.

Q. Are there any regular college courses or university courses given in fingerprint study?

A. No. There is a class—I think the lieutenant here with the Sheriff's office, conducted schools, and some of the [fol. 373] other—the lieutenant in our department taught school at the L. A. City College.

Q. Is there a course in fingerprinting at the L. A. City College?

A. There was, but I don't think there is at the present time.

Q. You never took any of these college or university courses, did you?

A. No, sir.

The Court: Just a minute. Let us find out if there are college or university courses, first.

Mr. Safier: He has testified already to one at the L. A. City College, your Honor.

Q: Are there any other college or university courses in fingerprint study, fingerprint work?

A. There is not, to my knowledge, no. Mostly all of these courses are the fundamentals of classification, and I have been with that for seven or eight years, and searching fingerprints, for that amount of time.

Q. All your work is done on the police or prosecution side, is it not?

A. That is true.

Q. Now, it is a fact, is it not, that given two fingerprints for comparison that experts may differ as to whether they compare, as to whether or not they were from the same finger?

A. Yes, that is possible.

[fol. 374] Q. Fingerprint comparison and identification is, after all, a checking of points of similarity, is it not?

A. That is true.

Q. Now, are the patterns that you have indicated on the blackboard, loop, whorl, arch and tented arch, the only four patterns that there are?

A. Well, in that division, yes. But each one of them have different patterns, but they are all considered—as for example, the whorl, that second one that I have there, there is quite a few whorl pattern prints.

Q. Isn't it a fact that there is another distinct pattern called the composite?

A. No, the composite, like I mentioned before, it is considered a whorl pattern. But it is composed of one or more patterns, but we call it the whorl.

Q. Will you explain the difference between what are known as central pocket loops, lateral pocket loops, twinned loops and accidentals?

A. I understood three of them, but I didn't the fourth. Would you repeat that?

Q. Central—tell us, first, what a central pocket loop is?

A. The central pocket loop is—it has the same formation as the ones on the left over there, but it has a tendency to have a small whorl up in the central portion where the core is, and it is called a central pocket loop. As far as [fol. 375] our classification is concerned, we still call it a whorl.

Q. What are lateral pocket loops?

A. A lateral pocket loop is one that has—the pattern goes over a certain area.

Q. What are twinned loops?

A. I don't understand that portion.

Q. Twinned, t-w-i-n-n-e-d loops?

A. No, they call them twin, t-w-i-n.

Q. All right, twin loops?

A. You have two loops—where you have two distinct loops in the pattern they are called twin loops. You have one going down and another one in the upper portion; you have twin loops; that is in the whorl pattern also.

[fol. 376] Q. What are accidental loops?

A. Your accidentals are just what you mentioned a minute ago, the composite—no, they are not. Pardon me. An accidental is a freakish pattern, such as may include two different or distinct patterns in one area, and it is called an accidental. I think it is often termed the same as a composite, carrying one or more patterns.

Q. How many different systems of classification are there in use today in the United States?

A. In the United States?

Q. Yes.

A. Well, I think the United States rely strictly—you mean to the classification or of the full set of fingers?

Q. Well, you said there are two major classifications; is that the single print and the full hand?

The Court: In other words, generally, which one is in general use?

A. The one in general use in classifying the ten fingers is the Henry System.

The Court: Now, with reference to the Larson or single classification, is that universally used or not?

A. Well, I think the universal use for single prints is Batley.

By Mr. Safier:

Q. What systems do the Los Angeles Police use?

A. We use a combination of the Larson, Batley and [fol. 377] Captain—ex-Capt. Barlow. We have a set-up all our own, where we have got three of them combined.

Q. That would be, then, a system that would be peculiar to your own Police Department and that is not in common use, as far as you know, anywhere else in the United States?

A. It is in classification of singles, but it is strictly—but it is mostly strictly Batley.

Q. When a man's fingerprints are taken by the Los Angeles Police Department, are they in every case immediately put into your classification system?

A. You still refer to this set here or the singles?

Q. No, I am not referring to either one. Suppose a man were brought into the Los Angeles Police Department, booked and his fingerprints taken, would they be forthwith put into your classification system?

A. They are brought into the Record and Identification Division of the Los Angeles Police Department and technical clerks classify them, search them through our files, and if they are not found to have a prior record, they are then filed in our files.

Q. I see. Now, how long will it take to strike that. Assuming you had the fingerprints of somebody that was brought in the Police Department and booked and fingerprinted, how long would it take to find his prints in your system if you had them in your system?

Mr. Roll: Just a minute. Are you talking about from [fol. 378] the fingerprint classification card or talking about something else?

The Court: I think counsel means, supposing Joe Doakes was fingerprinted, how long would it take him to find in their files whether he had previously been fingerprinted, by the same department. Is that the question?

Mr. Safier: That is the question.

The Court: All right.

A. Upon starting in to classify the fingerprints of a card similar to this, why, the average time it takes to search them, to find out if he has a prior record in there, I would say is three minutes.

By Mr. Safier:

Q. I see. Now, you, I believe you testified on direct examination that the fingerprint is made by the impression of the ridges, did you not?

A. Of the ridges?

Q. Is that correct?

A. That is correct.

Q. What substance is it that the ridges leave on the surface that makes the print?

A. It is perspiration through the sweat glands or pores that are in your ridges and the natural oily substance that is secreted by your body.

Q. Have you ever made any study of those oily substances to determine just what it was chemically?

A. I have not.

[fol. 379] Q. Now, I understand from your testimony that a fingerprint cannot be left on a human body?

A. That is true. On skin?

Q. On skin.

A. That is true.

Q. Skin will not take a print?

A. No, sir.

Q. How about wearing apparel?

A. That is possible, to develop a smudge where it had been handled, but not a print that could be identified.

Q. You could not get a print that could be identified off of wearing apparel?

A. In relation to the texture of the material or anything else. The fine material will show maybe a little bit more than a coarse material. The material itself, you can see where it has been handled.

The Court: Well, in the days when the men wore what we used to call hardboiled shirts, very stiff bosoms, and very stiff collars, what would you say about that?

A. That would be possible.

By Mr. Safier:

Q. Can you get a fingerprint off of leather?

A. Certain kinds of leather, yes. Patent leather is the most prominent.

Q. Did you yourself, Mr. Larbaig, photograph any prints from the door that is in evidence here?

[fol. 380] A. Photograph them?

Q. Yes.

A. No, sir, I did not.

Q. Did you make the enlargements from those photographs which you have with you here?

A. No; they were made in my presence.

Q. All you did was make an examination and comparison from those enlargements; is that correct?

A. That is correct.

The Court: Well, did you examine the unenlarged prints, in other words, the normal prints, and the lifted prints also?

A. Primarily my examination was made from the small ones.

The Court: In other words, the enlarged photographs are made really for court use so that everybody does not have to use a magnifying glass?

A. That is true.

By Mr. Safier:

Q. Now, how many points of similarity would you have to find in examining and comparing two fingerprints before you would make an identification that they came from the same finger?

A. For myself, I would be satisfied if the points were exceptional or odd, I would satisfy myself if there were just three or four.

Q. I see. Now, is there a difference of opinion on that [fol. 381] point among experts? Do some experts require a greater number of points of similarity before making an identification?

A. Well, like I said, if the points were odd in characteristics and everything else, I would be satisfied with four, but if there were no odd characteristics, just your natural flow of ridges ending, why, I would rely on ten to twelve points of similarity on different sides and portions of the print.

Q. All right, now, is it or is it not a fact that you might find ten or twelve points of similarity on two prints taken from different persons?

A. No, sir.

Q. You would not find that many?

A. No, sir.

Q. What would be the greatest number of points of similarity that you might find on prints from different people?

A. Two, and possibly three.

Q. Could it be four?

A. I do not believe so.

Q. Is three the greatest number that you have ever, yourself, seen?

A. I do not believe I have seen three.

Q. I see. Now, when you see three points of similarity, do you mean three unusual points of similarity?
[fol. 382] A. Well, three points of similarity in one small area where you would probably have three ridges ending in the same place, in the same space.

Q. Now, assuming one individual; do the patterns of all the fingers of that particular individual fall into the same class?

A. They do not.

Q. Well, might two, three or four of them fall into one class and the rest into another class?

A. No. You are apt to find any of them, you might find one person with all these on their hands on one time.

Q. You might find a person whose prints from each finger fall into one class, might you?

A. You might have loop, whorls, arch and tented arch all on the same hand.

Q. All on the same hand. Now, if you found as many as eight or ten points of similarity in comparing two prints, you would identify it as being from the same finger regardless of the number of points that were not similar; is that true?

A. Well, if they appeared in relation to one another from different sides of the prints, I would be satisfied in my own judgment it belonged to the same party.

Q. And, regardless of how many points you found that were not similar, you would attribute that to some foreign substance or some other cause?

[fol. 383] A. It might be attributed to that, yes.

Q. Well, you would attribute it to something like that—

Mr. Roll: Just a moment. I am going to object to that as a hypothetical question.

Mr. Safier: All right, I withdraw that question.

The Court: I think I get the point counsel is driving at. You may follow the subject up.

Mr. Roll: I have no objection to his following the subject, but the way he was going at it with the last question, I do object to.

By Mr. Safier:

Q. If you take two prints of the same finger and have them rolled, both rolled prints, under ideal conditions, Mr. Larbaig, they would be identical, would they not, in

every respect?

A. Well, no. I don't think you could roll two prints and have them identical.

Q. If they were both done under the same conditions?

A. No.

Q. Both done under similar conditions?

A. I still don't think you could.

Q. What is the reason for that?

A. Well, in the act of rolling your prints you might get more ink on one than you did the other, and you might roll it just a little fraction farther than you would the other. It would be impossible to roll two prints, one right after the other, and get them exactly alike. You might [fol. 384] get one a little wider than the other, and more tip on one than you did the other, or more the lower portion.

The Court: How about pressure?

A. And pressure also.

By Mr. Safier:

Q. Now, assuming one good rolled print and one latent print, if you found in comparison with those prints that you had, say, four points of similarity and perhaps ten or twelve points that did not appear to be similar, you would attribute all of those points that did not appear to be similar to some foreign substance being on the hand or something of that sort, would you not?

A. Well, in any—there are several things that could contribute to the dissimilarities; not having enough of the print, the foreign matter, as you say,—

Q. Well, as long as you have found four points of similarity you would find some way of explaining away the points of dissimilarity, wouldn't you?

A. No, if those four points of identity were outstanding and peculiar, I would be satisfied, but if they were not and there were, as you say, twelve or fourteen points of dissimilarity, I would not make up my mind that they were made by one and the same person.

Q. I see. I will ask you to look at People's Exhibits 24 and 25 and tell me if you find any points of dissimilarity.

[fol. 385] A. Yes, there are points of dissimilarity.

Q. Will you state what they are and point them out to the jury?

The Court: Do you want to step down to the jury?

A. First of all, in People's 25, the rolled ink impression is almost twice as wide. That is on account of the rolled ink impression, the fingerprints removed from the door is a print that has just been placed on there and taken off, therefore you won't get this very small area, you don't get the rolled area. That is your first dissimilarity. The print appears in width as very much smaller. It only covers, I would say, one-quarter of the area on the outside that is not included in this print here removed from the door. There is also this dark area at the top which I testified to prior, that indicates some foreign matter on the door, grease or something to that effect, that when those fingerprints are developed on there with this black powder, that the powder will adhere to this portion here and smear that area.

[fol. 386] Also there are lighter streaks through this print appearing in several places that there has not been the pressure put on at those points that there is in some of these other points that were readily developed, but this print here is under ideal conditions, rolled with ink on white paper and you have a direct contrast. Also on this print will appear,—this is developed with black powder, some ridges on this print which may appear along at a certain place or there is possibly some of this powder which has not been—did not come out of that area while brushing will appear to make it look like it was a solid ridge or something like that where they do not appear on this print.

Q. Now, will you point out what is known as the core?

A. The core as on the diagram is your most—centermost portion of that pattern area, the one that comes up in the middle of that, that is your core.

Q. Is it a fact that there is only one core for each finger?

A. In the loop pattern prints, yes, there is one core.

Q. This is a loop pattern print, is it not?

A. Yes.

Q. Now, is it not a fact that the core on these two photographs appear to be different?

A. They appear to be different.

Q. And the core is one of the central points of comparison in examining prints, is it not?

[fol. 387] A. No. It is one of the main points in the classification of a fingerprint for searching, but as far as iden-

tity, is has no more value as to that point as any other point on the card.

Q. On People's 25, on the lefthand side you observe a little white section with a dot in the middle where I am indicating?

A. Yes, that is true.

Q. Can you indicate that on People's 24?

A. I do not believe I can. The element of time between the time that this fingerprint was left on that door and the time this fingerprint was taken, why, anything could have happened.

Q. I see. Now, with reference to all the points on these two photographs that appear to be dissimilar, your explanation is based upon guess and speculation as to the reasons therefor, is it not?

A. That is true. I did not dust the print and therefore I could not tell you.

Q. Now, 28 and 29 go together, do they, Mr. Larbaig? Do these two go together?

A. They do.

Q. I show you People's 28 and 29 and I will ask you if you will point out the points of dissimilarity?

A. Yes, the points of 28 and 29, the prints photographed on the door, the ridges on there—

[fol. 388] Q. Do you want to step down and point it out to the jury?

A. The ridges appearing on this photograph, a photograph from the door appear much different than they do on this photograph here, on account of some portions we have, this area down in low, we have two portions that are superimposed, and also indicates pressure, quite a bit of pressure put on, and also slipping of the finger which I indicated to you people before was a movement of this, and this will not show on these plain impressions placed on that card.

[fol. 389] Q. Examined under the microscope, Mr Larbaig, many other points of dissimilarity could be found?

A. Yes.

Q. In these photographs?

A. Yes, there are quite a few more, on account of the pressure that was applied, which has changed quite a few things in the prints.

Q. Examined under the microscope many other points of dissimilarity could be found between Exhibits 25 and 24?

A. Not so many on that print; that print is a fairly good print.

Q. Other points of dissimilarity could be found, could they not?

A. I think under a glass you could find—not much more than what I have already explained.

Q. Now, People's Exhibits 26 and 27 go together, do they?

A. They do.

Q. Will you point out points of dissimilarity upon these two photographs to the jury, Mr. Larbaig?

A. These are similar to the ones that I just showed the jury, the same thing, pressure and slipping of the fingers, other than that they are the same as these others.

Q. I see. Other points of dissimilarity could be found under a glass as to these Exhibits 26 and 27, could they not?

A. Yes, they could.

Q. Now, did you roll the defendant's prints yourself?
[fol. 390] A. I did.

Q. When?

A. August 31, 1944.

Q. Did you yourself roll his prints prior to that at any time?

A. No, I didn't.

Q. Give me the date upon which you first made an identification of the defendant from the prints taken from the door?

A. I couldn't tell you offhand. I would have to check.

Q. Will you do that during the noon hour?

A. I think Officer Ferguson has it in an envelope.

Mr. Safier: I have no further questions.

Mr. Roll: Well, will that help you any in answering that question he asked (handing a document to the witness)?

A. Yes, sir, it will.

By Mr. Safier:

Q. What was the date when you first made an identification of these prints taken from the door, compared with the defendant's prints?

A. I identified these prints as belonging to Adamson on August 21, 1944.

Q. That is the same date you rolled these prints?

A. No, I rolled these prints ten days later.

Q. You rolled these prints ten days later?

A. They were identified on August 21, 1944 by me.

Q. I see. May I see that just a minute? Now, you can [fol. 391] answer this yes or no, Mr. Larbaig—

Mr. Roll: Counsel, I think possibly we might approach the bench before you go into that further. If you are going into anything further we are going to get into some other matters.

(Conference at bench between court and counsel out of the hearing of the jurors.)

The Court: Is this all with this particular witness?

Mr. Safier: That will be all, your Honor, at the present time.

The Court: I think before we call another witness, rather than to break in the middle of the witness' testimony, we will take a recess a few minutes early. The jury keep in mind you are not to talk about the case or form or express any opinion. We will take a recess until 1:45 this afternoon.

(Whereupon a recess was taken until 1:45 o'clock p. m. of the same day, Friday, November 17, 1944.)

[fol. 392] Friday, November 17, 1944; 1:45 O'Clock P. M.

The Court: The record will show the jury, counsel and defendant present. You may proceed.

Mr. Safier: Mr. Larbaig will not be back?

Mr. Roll: You excused him.

Mr. Safier: Well, I may want to ask him one question before we rest.

Mr. Roll: Will you take the stand?

CATHERINE T. MAY, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: What is your name, please?

A. Catherine T. May.

The Clerk: Miss or Mrs.?

A. Mrs.

Direct examination:

By Mr. Roll:

Q. Your full name, please?

A. Mrs. Catherine T. May.

Mr. Roll: Do you want to pull the microphone over?
That's fine, Mrs. May.

Q. Mrs. May, where do you live at the present time?

A. 146 West 87th Street.

[fol. 393] Q. Directing your attention to the month of July, 1944; where were you living during that month?

A. 744 South Catalina Street.

Q. In what apartment were you living, Mrs. May?

A. 409.

Q. Where is that with reference to 410?

A. Directly across the hall.

Q. Were you residing in that apartment alone?

A. Yes, I was.

Q. I understand your husband is in the armed services?

A. He is in the Navy.

Q. And he was at that time, is that correct?

A. Yes.

Q. About how long have you lived there in apartment 409?

A. Since the preceding August.

Mr. Safier: I am sorry, I did not hear the last.

(Answer read.)

By Mr. Roll:

Q. Were you at home, Mrs. May, on the date of Monday the 24th day of July, 1944?

A. Yes, I was.

Q. Now, this is the apartment that you occupied at that time, is that a fair representation of it?

A. That is right.

Q. With reference to the bed which is shown there in apartment 409 on People's Exhibit No. 1; is that the approximate location of the bed when it is out of the closet, [fol. 394] and down?

A. Yes, it is.

Q. And with reference to this article of furniture which is shown in the living room of apartment 409, People's Exhibit J, which is marked "divan;" did you have a divan of about that size and proportion there in that location on the 24th of July, 1944?

A. I did.

Q. Now, along in the afternoon of the 24th—withdraw that. Did you know Mrs. Blauvelt?

A. I knew her to speak to her in the hall; I didn't know her well.

Q. By that I take it you had a speaking acquaintance is that correct?

A. Yes.

Q. Now, directing your attention to the daytime there of the 24th after, we will say, 12 o'clock, did you hear anything unusual there in the way of any noises or sounds?

A. Well, early in the afternoon I heard—

Q. You will have to keep your voice up.

A. Early in the afternoon I heard a hammering in the hallway, and still a little later I thought someone was knocking at my door, my door kind of rattled and I listened again and heard another sound, but I knew definitely it was not my door anyone was knocking at, and still later in the afternoon, about 3:30 I heard—

[fol. 395] Q. Wait a minute. Now, let me ask you with reference to this hammering: Can you fix that approximately, what time the noise that sounded like a hammer to you?

A. Well, I could not say the definite time, but I would say it was, oh, perhaps an hour before 3:30 when I heard Mrs. Blauvelt, an hour or an hour and a half.

Q. Now, you started to mention approximately at 3:30 you heard something. What did you hear at approximately 3:30?

A. I heard Mrs. Blauvelt say "What do you want of me."

Q. Where were you in your apartment at that time, do you remember?

A. I was on the divan.

Q. On the divan?

A. Yes.

Q. Did you hear any audible words in reply to Mrs. Blauvelt's voice saying "What do you want of me"?

A. No, I just heard a low mumble; I could not distinguish what it was.

Q. You say you heard a low mumble but you could not distinguish the words?

A. No, I could not distinguish the words.

Q. Can you describe the tone of Mrs. Blauvelt's voice?

A. She sounded frightened; her voice did not sound natural.

Q. What, after that, was the next thing that you recall [fol. 396] hearing?

A. Well, later that evening I heard a key used in the lock of her door and, still later, I heard someone come out of her door and go down the back stairway.

Q. Now, is there any way you can fix the time of these two instances?

A. Well, I can't tell definitely. I would say it was after 6:30 and before 8, or around 8 that I heard the key used, but it was later than that that I heard someone going down the back stairway.

Q. And when you say you heard a key used, can you describe a little more what you mean by that?

A. Well, just as if someone used a key in the lock and turned the lock.

Q. Where were you at that time, do you remember?

A. I was in bed.

Q. You were in bed?

A. Yes.

Q. With reference to the bed, I will ask you—upon the diagram that depicts the approximate location of the bed, where was the head of the bed with reference to the hallway? Was it towards the hallway side or towards the divan side?

A. Towards the hallway side.

[fol. 397] Q. Where were you lying on the bed? Where was your head?

A. My head was towards the closet door, where the bed goes into the closet.

Q. That would be towards the bottom of the diagram, that diagram that is on the board there?

A. Yes.

Q. Now, did you get up and go out yourself or not?

A. No, I didn't.

Q. Now, going back to the first instance there where you heard Mrs. Blauvelt's voice, heard her say, "What do you want of me?"—you weren't able to distinguish any

other words? I understood you to say it sounded like a low mumble?

A. Yes.

Q. Now, with reference to that low mumble, would you say that that low mumble was Mrs. Blauvelt's voice or a different voice?

A. That I couldn't tell. It didn't sound like—I couldn't tell whether it was a man's or a woman's voice even.

Mr. Roll: You may cross examine.

Cross examination.

By Mr. Safier:

Q. Mrs. May, the events to which you have testified on direct examination occurred on what day?

[fol. 398] A. Monday, the 24th of July.

Q. How do you fix that as being the date?

A. Well, after the murder occurred we, of course, noticed the day and the date.

Q. You thought back over those events and fixed it in that fashion?

A. We didn't have to think back; she was found on Tuesday.

Mr. Roll: I did not hear that.

(Answer read.)

By Mr. Safier:

Q. You knew it was the preceding day that you had heard these noises; is that right?

A. Yes.

Q. Now, had you been out of your apartment on the morning of July 24th?

A. How early in the morning?

Q. Well, had you been out of your apartment that morning at all?

A. I didn't go home until about 7:30. I had been out visiting my sister until 7:30 in the morning, when I came home.

Q. You came home at 7:30 in the morning?

A. That is right.

Q. You remained in your apartment the rest of the day?

A. That is right.

Q. Now, the first thing you heard was what appeared to [fol. 399] be some hammering; is that right?

A. Yes.

Q. You fix the time of that hammering as about what hour?

A. Oh, I would say around 2 o'clock.

Q. Around 2 o'clock?

A. Yes, but it is not definite; it could have varied.

Q. Your best estimate is it was around 2 o'clock?

A. Yes.

Q. And the next thing that you heard unusual was what?

A. Was when my door rattled, and I thought perhaps it was a knock at my door.

Q. Did you determine that that actually was your door rattling?

A. Well, I determined it was not a knock at my door.

Q. Well, did you determine it was your door rattling?

A. Well, there was a noise—there was a rattling some place.

Q. How much time elapsed from the time that you heard the noise that sounded like hammering until you heard that other noise that appeared like a knock?

A. I don't remember how long it was.

Q. Now, what time was it you heard Mrs. Blauvelt's voice say, "What do you want of me?"

A. That was at 3:30 in the afternoon.

Q. How do you fix that time?

[fol. 400] A. I looked at the clock.

Q. You looked at the clock after you heard the voice speak or before?

A. Well, that I don't remember.

Q. I see.) But you fix the time—

A: It was probably after, because I wouldn't have looked before.

Q. You fix the time as being exactly 3:30?

A. 3:30 or 3:31.

Q. Now, at any time that afternoon did you hear a scream?

A. No, I didn't.

Q. You were home all afternoon?

A. Yes, I was.

Q. Now, what was the next thing that you heard that was unusual?

A. The key being used in the lock—that was not unusual; I just noticed it after hearing the remark in the afternoon.

Q. Then, about what time was it you heard the key in the lock?

A. The time I am not sure of. It could have been any time between 6 and 8 o'clock.

Q. I am sorry; I did not hear.

A. I said it could have been any time from 6 until 8 o'clock. The time I didn't notice.

Q. It was some time between 6 and 8 o'clock. Well, can [fol. 401] you tell us about how much time elapsed from the time that you heard Mrs. Blauvelt's voice until you heard the key in the lock?

A. No, I can't.

Q. Would you say it was before or after 6 o'clock that you heard the key in the lock?

A. After 6.

Q. After 6?

A. Yes.

Q. What was the next thing that you heard?

A. Someone closing the door and going back down, down the back stairway.

Q. How much later did that happen after you heard the key in the lock?

A. I don't remember.

Q. What is your best recollection?

A. I can't say how much later it was.

Q. Well, did you hear the key in the lock and then immediately hear someone going down the stairs?

A. No, I did not.

Q. Would you say it was around 9 or 9:30 in the evening that you heard the door close and someone go down?

A. I don't know what time it was.

Q. Are you able to tell us whether it was before or after 9 o'clock in the evening?

A. No, I could not.

[fol. 402] Q. You could not say?

A. No, I don't think it was after 9, but I am not sure.

Q. Well, from the time that you—withdraw that. Would you say from the time you heard the key in the lock until you heard the door close was a period of about three hours?

A. I don't know.

Q. Can you state whether it was more than one hour?

A. I still don't know.

Q. You still don't know. Now, you remember testifying at the preliminary hearing in this matter, do you not?

A. Yes, I do.

Q. I will ask you to read your testimony on page 17, lines 6 to 21. Will you just read it to yourself, please (handing transcript to the witness). Now, I will ask you if these questions were asked of you and whether you gave these answers:

"Q.— And what was that?"

"A.— Earlier in the evening I heard a hammering in the hallway. I thought at the time the janitor was doing work out there, and later on in the afternoon I heard a noise that sounded as though it was knocking at my door and I listened again, and it was just my door rattling. Then later on in the afternoon, between 3:30 and 4 o'clock, I heard Mrs. Blauvelt say, 'What do you want of me?' and it was either in the hallway or with the door open, because I heard it very distinctly. Then, later that evening—

"Q.— How much later?"

[fol. 403] "A.— Oh, I would say it was after 6. The time I am not sure of. I heard a key used in the lock in that door, and still later in the evening, I would say around 9 o'clock or 9:30, I heard that door close and someone go down the back stairs."

Were those questions asked and did you give those answers at that time?

A. Yes, sir.

Q. Now, did you at any time on that afternoon or that evening open your front door?

A. I went out to get my paper, which was in the hallway in front of my door.

Q. About what time was that?

A. Well, I would say between 5 and 5:30.

Q. I am sorry, I did not hear you.

A. Between 5 and 5:30.

Q. Between 5 and 5:30. At the time you went out to get your paper did you observe whether or not Mrs. Blauvelt's paper was in front of her door?

A. No, I did not.

Q. You did not observe?

A. No.

Q. Was Mrs. Blauvelt's door open or closed?

A. I did not notice that either.

Q. Did you observe whether the door to the garbage disposal compartment in Mrs. Blauvelt's apartment was [fol. 404] open or closed at that time?

A. No, I did not.

Q. You did not observe?

A. No, I did not.

Q. You did not see anyone entering or leaving Mrs. Blauvelt's apartment at any time that afternoon or evening?

A. No, I did not.

Q. Would you say now that it was about 9 or 9:30 in the evening that you heard the door of Mrs. Blauvelt's apartment close and someone go down?

A. I wasn't sure of the time. I said about 9. I have never been sure of the time.

Q. Was your recollection fresher at the time you testified at the preliminary hearing than it is now?

A. Well, I think it would be, yes.

Q. Did you at any time on July 24th see Mrs. Blauvelt?

A. No, I did not.

Q. Did you on July 24th or July 25th see any strangers around the building?

A. I didn't see anyone.

Q. Now, you testified that after you heard Mrs. Blauvelt's voice say, "What do you want of me", that you heard a low mumbling?

A. Yes, I did.

Q. Were you able to tell whether it was a man's or woman's voice?

[fol. 405] A. No, I couldn't tell.

Q. You couldn't tell. When you heard Mrs. Blauvelt's voice say, "What do you want of me", was it in a loud voice?

A. Well, it was not very loud; it was—

Q. Just an ordinary speaking tone?

A. Well, her voice did not sound right; it sounded frightened but it was not a real loud tone.

Q. You didn't make any investigation?

A. No, I did not.

Q. Or any report to the landlady?

A. Not at that time.

Q. From the time that you heard the lock in the door until you heard the door close and someone walking—did you hear someone walking?

A. Yes, I did.

Q. From the time that you heard the key turn in the lock, the door close and someone walking, was it a considerable length of time between those two things?

Mr. Roll: Wait a minute, counsel. I am going to object to that. I believe it assumes facts not in evidence. If I understood the testimony, I think the key-in-the-lock transaction is, the way she testified to here, a different time than the time she heard the door close.

The Court: That is as I understood the witness even on cross examination.

Mr. Roll: That was my understanding on both direct and [fol. 406] cross examination.

Mr. Safier: As I understand her testimony, she said at one time—

The Court: Well, let's find out if there is any question about it: Did you hear the steps, the footsteps, going down the stairs immediately after you heard the door of the apartment—?

A. No, I did not.

The Court: That disposes of that.

By Mr. Safier:

Q. Can you give us an approximation of the time that elapsed between the time you heard the key in the lock and the door close and the footsteps?

A. No, I cannot; I haven't any idea what time elapsed.

Q. Well, would it be a matter of five or ten minutes, or a matter of an hour or two hours?

A. I don't know; I don't remember.

Q. You could not tell whether—

A. I know it was not immediately after, but how long a time there elapsed between there I don't know.

Q. What were you doing at the time you heard the key in the lock?

A. I was reading.

Q. You were reading?

A. Yes, and listening to the radio in bed.

Mr. Safier: I did not hear the last part of the answer.

The Court: "I was listening to the radio in bed."

[fol. 407] By Mr. Safier:

Q. You were already in bed at the time you heard the key in the lock?

A. Yes, I was.

Q. How long had you been in bed?

A. I went to bed about 6:30.

Q. About 6:30. Can you say about how long you had been in bed before you heard that key in the lock?

A. No, I can't.

Q. Well, had you been in bed reading for quite some time?

A. I don't know.

Q. What time did you quit reading that night?

A. I don't know.

Q. Well, did you read a whole book that evening?

A. No, I wasn't reading a book; I was reading a magazine.

Mr. Safier: I have no further questions.

Redirect examination.

By Mr. Roll:

Q. Counsel asked you on cross examination if you made any report to the landlady that night, and your answer was, "No, not at that time," in substance. Did you later on say something to the landlady—I don't want the conversation—about this noise?

A. I did the next morning.

Q. You did the next morning?

A. Yes.

[fol. 408] Mr. Roll: That is all. May this lady be excused?

The Court: She may be excused.

(Witness excused.)

Mr. Roll: I wonder, if under the provisions of the Penal Code, if your Honor please, pertaining to experts, if your Honor would be kind enough to call the expert that has been appointed by the court, Mr. Rogers, and ask him some questions as to his qualifications and then allow counsel to examine him.

The Court: Yes. However, it is not under the Penal Code; it is under the Code of Civil Procedure.

Mr. Roll: The Code of Civil Procedure; I am sorry.
The Court: Mr. Harris.

HARRY W. ROGERS, called as a witness by the Court, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. Harry W. Rogers.

The Court: Just for the record, Mr. Rogers was appointed by the court under the provisions of Section 1781 of the Code of Civil Procedure.

Cross examination.

By the Court:

Q. Where do you reside, Mr. Rogers?

A. 731 Nevada Avenue, El Monte.

[fol. 409] Q. Your business or occupation is what?

A. Lieutenant of Identification, Sheriff's Department, County of Los Angeles.

Q. Does that make you head of the Identification Department?

A. Yes, sir.

Q. How long have you been with the Sheriff?

A. It will be seventeen years the 1st of January next.

Q. How long have you been in the Identification Department of the office?

A. About—nearly sixteen years.

Q. Now, prior to your going with the Sheriff's office had you done any work along the line of identification, particularly along the line of fingerprints?

A. No, sir.

Q. When did you commence your interest, studies and reading in that subject?

A. The first year that I went in the department I took a course in fingerprints, and then later that same year I took a Civil Service examination and went into the actual work on December 1st.

Q. You mean there was a special Civil Service examination for Identification Bureau work?

A. Yes, sir.

Q. Who gave the course, Mr. Rogers?

A. The man who was then in charge of the Identification [fol. 410] Bureau, Mr. Adams.

Q. Also in the Sheriff's office?

A. Yes, sir.

Q. Have you taken any other courses or listened to or heard any other lectures on fingerprints, that you now recall?

A. No.

Q. I am referring, when I say lectures, to talks by people who know something about it.

A. Not in the nature of a course. I have heard lectures on various phases of fingerprint work, but not definitely a course.

Q. By that you mean you have heard various speakers—

A. Yes.

Q. Who have spoken on the subject?

A. Yes, sir.

Q. Directly along your particular line?

A. Yes.

Q. Have you attended any schools as a student?

A. Not purely fingerprint schools, no, sir.

Q. Well, are there any purely fingerprint schools, that you know of here in California?

A. Yes, there are several.

Q. You mean they devote themselves directly and exclusively to fingerprints, or as a part of a general course in police science?

[fol. 411] A. Well, both. That is to say, the School of Government, U. S. C., is devoted to general governmental courses. There are thirty-eight police courses, of which one of those is fingerprints.

Q. That is a course that is commonly taken by a great many police officers, sheriffs, and officers around this vicinity?

A. Yes, it is.

Q. Have you ever yourself been an instructor or teacher of the subject of fingerprints?

A. Well, I taught that particular course for a little over four years.

Q. That is a University of Southern California course?

A. Yes, sir.

Q. Have you done any other teaching or instructing?

A. Yes, I instructed in the Police Officer's Training School held at the State College at San Jose a few years ago; I have forgotten the exact date. I have instructed—that was for

a summer course. I have also taught a special course at U. C. L. A. on the subject of fingerprints, which also was a part of the general course of criminology.

[fol. 412] Then I taught in our own department, the Sheriff's Training School, for a period of three years; most weeks one night and some weeks two nights a week.

Q. This may be a little off the subject, but it may explain your last answer. The Sheriff has for some time conducted a training school instructing his deputies in various branches of criminology, penology, police science and so forth?

A. That has been the practice; it has been discontinued now because of war conditions and so on. But up until the outbreak of the war it was the practice of the Sheriff to maintain a training course for his deputies.

Q. Now, is there an organization limited very largely to fingerprint work in this section of the country?

A. Yes, there are two such organizations. There is the California Division of the International Association for Identification, the membership of which is composed of men who are in Sheriff's work, fingerprint people, and also photographers. Then there is a local—that organization meets only once a year, has a convention once a year, at which there are prominent speakers who speak and instruct on phases of identification. Then, locally there is the Southern California Identification Officers' Association, which meets once a month.

Q. Just to cut it a little bit short—the members of these associations get together—these special fingerprint men—[fol. 413] and mostly talk shop?

A. Yes.

Q. With reference to reading, what reading have you done upon the subject of fingerprints?

A. Well, I have read practically everything—do you want me to mention the specific authors?

Q. Well,—

A. I have read practically everything—

Q. Do you know of any book you have not read? Let us put it that way.

A. Well, I have read practically everything, in particular, Galton, Kuhpe, Henry, Wentworth, Wilder, Chappelle, Bridges, and also Batley, Crosskey, and I have read but not studied Larsen.

Q. In addition, have you read shorter discussions on the subject, such as would appear in the Journal of Criminology and the bulletins gotten out by the Federal Bureau of Investigation?

A. Yes, I see the bulletin which is gotten out by the Federal Bureau of Identification, a monthly publication; also there is a fingerprint magazine published monthly that comes to my desk each month which I read.

The Court: Your work since you have been in the Department has included—counsel may object to this; I am trying to save a little time—I presume it has included the handling of all fingerprint problems from the locating, origin and all [fol. 414] latent and patent prints, the photographing of prints, the taking of fingerprint cards; in other words, rolled prints of prisoners, comparison and analysis of fingerprints generally?

A. It has.

The Court: I think that is as far as the court should go in this matter. I will turn the witness over to counsel.

By Mr. Roll:

Q. Mr. Rogers, if I may ask you some preliminary questions. I may not go into as much detail as I did this morning, but will you please, briefly in your language, tell us about the structure of the fingers, about fingerprints and what goes to make a latent fingerprint.

A. A latent fingerprint?

Q. Yes.

A. Well, nature has put on the inner surface of the hands and the feet certain papillary ridges, that is to say they are raised above the rest of the surface, and there are pores through which the perspiration is exuded from the skin, from the body. The skin itself, there are two layers of skin, the dermis and the epidermis, and beneath those are certain sweat glands, through which the secretion is exuded through the pores. Now, as to the latent print, it merely means that a person touches an object and the pores on which there is moist perspiration leaves an imprint. That is the secretion has gone upon the object touched. The furrows or valleys or depressions between the ridges, [fol. 415] the lower part, will not leave an impression in a person's hands that are normal. Of course, a person

who is nervous and perspires a great deal, the inner surface of the palms or fingers will be covered with moisture but, normally speaking, it will be only that moisture, that portion which comes through the pores, and we have then an outline of the ridge surface and it is called a latent print because normally it is not visible to the naked eye, but sometimes it will be made visible by throwing a light upon it from the side. In other words, if you put your eye down to the level of that railing you will find many prints there which were put there this morning by persons who have touched that railing. They are not visible as you look at them directly, and to bring those to view by a light so that they may be photographed it is necessary for the fingerprint man to use some agent that will develop or bring out that print so it may be photographed. The agent that is usually used is powder, because it is more convenient, but you can use certain chemicals, you can use iodine on certain surfaces but, as a general thing, he uses a powder that will contrast with the surface upon which the print is believed to be. If it is a white surface he will use black powder, but if it is a black surface he will use a white or gray powder, and what he is doing is trying to get a contrast so that he may photograph that print. One of the main factors in photography is to get a contrast [fol. 416] so as he dusts the powder over that he sees that it is developing a print of a certain type. As he brings it into view he will brush it out very lightly in the direction of the ridges so that he will get a good print. If he fails to do that, if he uses too much powder or brushes the wrong way, he will fill up the portions of the print which has been blank because of the furrows and valleys as they are sometimes called, and that is all that is meant by developing a latent print. Does that complete the answer, or is there something more?

Q. That is fine. Just very briefly, will you tell us what is meant, without going into all of your symbols, when we use the word classification of prints?

A. Well, two things are meant by classification. You have to either speak of the classification of the entire card, which is quite different than the classification of the print. Do you want me to tell both?

Q. Yes, tell them both briefly, if you will.

A. The fingerprint card as it is taken is, as you know, with the thumb in the upper lefthand corner, the right hand

at the top and the left hand in the same way, that is, the thumb under the thumb, and so on, so that at the top we have the rolled impression, the rolled ink impression, of each of the ten fingers. At the bottom we have a plain impression that is put in there for the purpose of checking to see that the prints are in the right order. Now, that classification is based primarily upon the arrangement of [fol. 417] the pattern of the hand. Those patterns which have two deltas, whorl type of patterns, are—the space in which they appear is given a certain classification, for instance, if there is a whorl in the right thumb, that is given a value, and all the other prints are in whorls, that is given a value of 1 over 17. I cannot go into the technical part of it, but it is the rule, I believe, that all persons who would have a whorl in the right thumb and no other whorls in the hand would all have a primary classification of 1 over 17, they would all be filed together, and then perhaps a classification given to those. Then the next division is to take the index and the middle finger, and they do this in the case of loops, by counting the ridges. In other words, they are going to be classified and filed according to the size, in other words, if the ridge had only three or four, the loop, for instance, had only three or four ridges intervening between the core and the delta, you would not file that with a print that had ten, eleven, twelve or thirteen. This is a division of size. The index finger was selected originally because nature has, for some reason, placed a greater diversity of pattern in the index than any other finger, therefore it is of secondary importance and called secondary [fol. 418] classification. It is divided further by the type of pattern, the ridge count in the middle finger, the ring finger and finally the number of ridge counts in the little finger in the case of a loop. In other words, if we are using this illustration, 1 over 17 for that whorl, and we found two small loops, there would be a further classification and the final count in the little finger might be one over 36, or might even be more, but that is a pretty big loop, and then it would be filed in a particular compartment, the latter being 1 over 17, it would be divided this way and filed by the count in the little finger. That is the final classification. There are other divisions using the thumb, using, in other words, a ridge count but essentially that is the method used in classifying these fingerprint charts. Do you want me to take up the single, too?

Q. No, I think that will be sufficient on that. In so far as your classification, it is used primarily for the purpose of filing; is that correct?

A. A place to file the print.

Q. In other words, when a fingerprint card, a whole card gets into the office there the classification is made of it and it is put in a certain file, is that right?

A. Well, ultimately.

Q. That is what I mean, ultimately.

A. That is correct.

Q. Now, will you tell us what you mean by comparison of [fol. 419] fingerprints as distinguished between what we have just been discussing?

A. I see. There are three steps in making comparison of fingerprints that is possible. You have this card of a certain person, you have another card or you may have a single print. There are three steps. The first is as to the general type of pattern, the general contour.

Q. Do you want to use the blackboard?

The Court: You may do so.

Mr. Roll: Surely. There is no objection to taking this little sketch out?

The Court: No.

A. It is obvious that if one print were of this type you could see at a glance that it could not be identical with this print, nor could it with this one or this or this print. In other words, the first step is to determine the pattern type and if they are alike you can go further; if they are not alike you are through. Any layman can see that. The next step will be to count the ridges of those patterns which have a central point or core and delta. That is possible both in this type of pattern and in this type of pattern, it is perfectly possible to count those ridges intervening there, and if you had a whorl of that type it would be perfectly possible to count those ridges and if you had four other and 1, 2, 3, 4, 5, 6, 7 of these the next step in comparison is to count the number of ridges intervening [fol. 420] between the core and the delta. Having done that the third and most important step is to check the points of identity, characteristic points within the loop. Assuming you have two loops with four counts in them, we have to examine those prints to see if they have the same

points of comparison, the same points of identity. Now, those points of identity are these. They are very seldom in a case like this that nature has put a continuous ridge which will fill the interspacing, but we will find a forking of the ridges, a bifurcation, you will find an abrupt ending where the ridge ends abruptly and possibly down here there will be two other ridges that come in like this, possibly they will join, and then we have a forking or bifurcation upward. The ridge might even join again, and we have an island or an enclosure. There may be other ridges like this, or maybe a little longer, so those are the characteristic points, the points of identity. Now, those points must occur in the same relative position, that is to say, — I am afraid I cannot use this.

The Court: Well, I think I get the point you are after. In other words, you have drawn a print there indicating an island. If you found an island in your fingerprints which have been picked off the scene of the alleged offense you would locate the island with reference to the core, that would be your first step, would it not?

A. Yes. What I am trying to show, sir—

[fol. 421] The Court: Then what would you do in making your comparison so far as the island is concerned with that fingerprint card, the rolled print?

[fol. 422] A. Well, we first must see if this island in each print is, say, the third ridge of the core at this same point and joining again at this same point, in an island out here,— in other words, the characteristic points must appear in the same analogous location, the same location on each print, so there is not only comparison of points of identity but they must occur in the same print. Now, when you have found, as the judge indicated by comparing the known print, the inked impression of a person with the one which is in question, then when you have found a sufficient number of these points to identify the whorls, bifurcation, abrupt ridge endings, short ridges, and so on, occurring in the same relative position, for instance, this second ridge, bifurcated downward, this second one downward, an island here at the same exact spot, then you know that the two prints are made by the same finger. I think that was the extent of your question.

Mr. Roll: Yes, Mr. Rogers.

Q. Now, let me ask you before you go any further: Do you know whether or not it has been figured out mathematically the chances of any two persons possibly having the same fingerprint or can it happen at all?

A. Yes, it has been worked out. A French mathematician, Balthazer, in about 1912 or '13, he presented a paper to the French Academy in which he figured that the probabilities of two persons having the same fingerprints were [fol. 423] one in—one followed by sixty ciphers, whatever mathematical figure that is.

Q. It is too large to say.

The Witness: Do you want me to indicate how it was done or not?

The Court: I think it might be interesting, but it might be consuming too much time. He did work it out on a mathematical basis?

A. Yes, sir.

By Mr. Roll:

Q. Now, in this case you were appointed an expert by the court; is that correct?

A. Yes, sir.

Q. And you came into court and in court did you pick up from somewhere in court certain negatives?

A. Yes, the court handed me six negatives.

The Court: 20, I think, is the number of the exhibit.

Mr. Roll: Yes.

Q. I am going to show you People's Exhibit 20, which contains three negatives, and I will ask you to look at those and state whether or not those are the ones that were turned over to you.

A. Yes, sir. Those were in the envelope, another envelope which was handed me by the court day before yesterday.

Q. What did you do with those after that? Go ahead and tell us the steps that you took. Did you look at the door [fol. 424] which is there in front of you, which has been marked in evidence?

A. Well, I was directed to the judge's chambers where the door, which is now in front of the desk here, was, and I examined it under a magnifying glass, the surfaces which had been dusted with black powder.

Q. Just a minute. When you say "surfaces", do you mean all surfaces that had been dusted?

A. That is correct.

Q. Go ahead.

A. I noted particularly that there were three places where dusted prints had been—paper had been put over them for the purpose of preserving the prints, and those I checked against these negatives to be certain in my own mind that these negatives were from the particular places on the door. I also checked—

Q. Go ahead.

A. I also checked the other portions which had been dusted, thinking there might possibly be a legible print.

Q. Now, with reference to these three negatives, you say you checked the three negatives against the various portions which have been marked on the door opposite "A", "B" and "C"; is that correct?

A. That is correct.

Q. And did you find these three negatives to actually be negatives of the prints thereupon—"A", "B" and "C" on [fol. 424a] this door?

A. I did.

Q. Go ahead. Then what did you do?

A. Then I went to the I. Laboratory, which is on the tenth floor of this building, and called the defendant from his tank to the identification bureau for the purpose of rolling a set of his prints.

Q. And did you roll a set of his prints?

A. I did.

Q. Now, I think you were in court when Mr. Larbaig testified this morning. Is that the same general system that you used as he described in rolling prints?

A. Yes, sir.

Q. That is what you did in this instance?

A. Yes, sir.

Q. Do you have the fingerprint card there, Mr. Rogers, that you rolled?

A. Yes, sir.

Mr. Roll: I offer that card in evidence, if your Honor please.

The Court: 30 in evidence.

By Mr. Roll:

Q. Now, after you rolled the fingerprint card of the defendant, then what happened? What did you do next?

A. Then I examined—first I made contact prints of these because it was a little easier to handle than these negatives, [fol. 425] tives,

Q. What do you mean by contact prints?

A. Such as were exhibited in court this morning.

Q. In other words, a paper was placed in direct contact with the negative—

A. I made prints of these negatives.

The Court: You got prints of the exact size?

A. Yes.

By Mr. Roll:

Q. Go ahead.

A. It was necessary, with the assistance of one of the photographers of the County, to enlarge certain fingerprints, and one of those enlargements was of the print here, this right middle of the defendant.

Q. You indicate this print here as being one of the ones you enlarged?

A. That is correct.

Q. Do you have the photograph as enlarged?

A. Yes, sir.

Q. Which one is that, this one here?

A. Yes.

Mr. Roll: May this, if the court please, be marked People's Exhibit 31?

The Court: 31.

Mr. Roll: In evidence.

A. Then an enlargement was made of the original exhibit, or negative, which is—I don't know the number. [fol. 426] Q. It is No. 20.

A. On the reverse side—the print on the reverse side of the door.

Q. That is the one right here; the one we have indicated on the door as being "C"?

A. Yes. This is the enlargement made by one of the official photographers, in my presence, of whatever that exhibit is.

Q. People's Exhibit 20, the single print.

Mr. Roll: I will ask that this enlargement be marked People's Exhibit 32.

The Court: It may be so marked.

[fol. 427] By Mr. Roll:

Q. Now, after you did that, then what did you do?

A. Then I made enlargements from the other two negatives, or attempted to make enlargements of the other two negatives, and also of the fingerprint card. And the next step, after they had been properly washed, dried and developed, was to compare those enlargements—or, first, mount them on the cards and then compare those enlargements.

Q. Now, you have here—you have brought up 31 and 32, which have been marked here in evidence; can you—you have indicated that this is the one taken from the rolled card, 31, and this is the one which is a photograph of the single print, "C" on the door. Can you at this time—I see you have no red lines on there. Can you state at this time whether in your opinion—withdraw that. Mr. Rogers, have you formed an opinion with reference to these two sets, Exhibit 31 and Exhibit 32?

A. I have.

Q. Will you state to the members of the jury and the court your opinion concerning those prints?

A. Both of these impressions were made by the finger of the same person, the right middle finger, I should have said, of the same person.

Q. With reference to your reasons for—I notice that on those two cards there, sir, you have not put any lines showing the points of identity. Do you have some pencil or [fol. 428] something that you could use right here in front of the jury so you could point them out as you go along?

A. If it is permissible, I would prefer to do it on the blackboard.

Q. All right; go right ahead, sir.

The Court: Well, I think we should have—I wonder if we couldn't get another blackboard?

The Bailiff: I may be able—

The Court: Have we got one?

The Bailiff: I think there is one in here.

The Court: Maybe we have recovered it. The blackboard sometimes wanders around the floor here, and we have quite a time to get it back.

The Bailiff: No, it is not in there.

The Court: I think we will take our recess. We are pretty close to our normal recess time. I think we will take our afternoon recess and see if we cannot find a blackboard in the interim. The jury keep in mind the admonition not to talk about the case or form or express any opinion.

(Recess.)

The Court: The record will show the jury, counsel and defendant present.

Mr. Roll: Mr. Rogers, if the court please, was kind enough to make three sets; one he desires to use, he has given one to defense counsel and one to myself, and I have picked up my set and the set he gave defense counsel, and [fol. 429] I thought possibly while he was making this diagram, we could let the jurors handle two of those sets and he could use one.

The Court: That is all right.

By Mr. Roll:

Q. So there won't be any question, Mr. Rogers, will you tell us—these were Exhibits 31 and 32—will you tell us again, Mr. Rogers, where these are from?

A. 31 is an enlargement of the inked impression of the defendant's right middle finger; 32 is an enlargement of the print found on the reverse side of People's Exhibit—

Q. People's Exhibit No. 6.

A. Marked "C".

The Court: That has been referred to heretofore in the record as the metal side or inside of the door.

A. On the metal or inside of the door. We have indicated—the first step is to compare this pattern—it has 16 ridge counts intervening between the core and central point of the print and the formation, where one ridge goes below and one goes in a V-shape. There are sixteen points intervening between those two points. This is the questioned print, this is the one which we shall attempt to indicate on the board with points of agreement, points of similarity. These lines are merely put in for purposes of outlining the pattern. We will start with the delta formation, where we have a V-shaped ridge. For convenience, I would like to mark that as No. 1. We will refer to it a little later, [fol. 430] this point. Looking at it this way—the bifurca-

tion, looking at it that way, we will call No. 2. Then, we find that at about this point, as near as we can get it in proportion, we have a ridge that comes down and forms a fork, [fol. 431] and that upper bifurcation of the ridge continuing on parallel with the outline ridge; that ridge continues on, then. I am not attempting to indicate the smudged or blurred portion of the print here, but taking as near as possible those—I am speaking now of this portion here—but taking the lower portion now and starting from the right, from the delta—

Mr. Safier: Mr. Rogers, will you indicate on here where you are drawing from so I can follow you?

A. Yes. The point which I have indicated here, sir, as No. 1, is this point here. The point which I have indicated,—

[The Court: Keep your voice up, Mr. Rogers.]

A. I am sorry, sir.

The Court: Keep your voice up; the reporter has to get what you are saying to counsel. I don't know whether the record entirely shows what happened. Counsel asked a question.

A. Speaking to defense counsel, I have indicated as point 1, on the enlargement of the inked impression, this point—it is technically the point of the delta—where the two sides of the "V" come together. I have indicated that, for the convenience of counsel, as No. 1. And I will continue now and draw a red line on his card for No. 2, so he may follow the design on the board.

Mr. Safier: Thank you.

A. Then, we will indicate as 3 another bifurcation up, [fol. 432] ward, at approximately that point, and it again joins to this ridge at this point, which we will indicate as 4. Then, from point No. 3, going over one ridge, that is the next ridge, to the—the next ridge to the right, from No. 3, we find an abrupt ending, which we will indicate as No. 5. The next ridge to that has a bifurcation; it is very close in the latent print, and it may show as an ending in the inked impression, which is clearer, and that is at this point here. I will try to make that faint there, because that is what has happened. Now, below—

Mr. Safier: Mr. Rogers, I am sorry to interrupt, but would you mind drawing a line—

The Court: Just a moment, counsel, please. I would like to accommodate you, but I think you should ask those questions on cross examination. Suppose you let him go ahead.

Mr. Safier: I am simply trying to follow it.

The Court: I appreciate that, but every time you interrupt we have to digress and go back, backtrack. I think you should wait and ask questions under the rules of cross examination, wait until the witness has finished.

Mr. Safier: I thought it would simplify it.

The Court: I am afraid it would just simply complicate it.

A. Then, from this point, we have a series of five ridges, which have apparently no breaks. The fifth ridge, however, [fol. 433] at approximately the same location, if we speak of it as the hands of a clock, we would say at 3 o'clock. From this point we find that there is an upward bifurcation, and that we would indicate as 7. Then, two more ridges intervening, about the same relative position at the point of the clock—it may possibly be a little nearer 2 o'clock—we have a ridge that again bifurcates and while it is somewhat indistinct, it is quite evident that it joins the ridge up in here, forming an island. However, because it is very indistinct we won't mark it as a distinct point of identity; it may or may not be. But this definitely is, and we will mark that No. 8. Then, from that point, No. 8, with one ridge intervening, we come to the ridge which forms a part of the core, the core being at this point. So that following over now, with one ridge intervening, we find this formation, joining to the ridge that forms the core at that point, No. 9. I would like to indicate that to counsel now, if I may.

The Court: Yes, you can orient him on that particular spot, if you will.

A. The point I have now marked No. 8 is this point here (indicating).

The Court: 9 was your last number, Mr. Rogers.

A. I beg your pardon. 9. The point in question was No. 9, which is the bifurcation downward on the core, on the ridge which forms the core. Enveloping the [fol. 434] ridge, the one which comes up over the core—it is not too distinct in the latent or questioned print, be-

cause this formation—I am not using any characteristic points on it at that particular spot, but it bifurcates also about here, and then counting up from that point, with one ridge intervening, we have what appears to be an island formation—with the ridge coming, joining again, forming an island formation at approximately this point, the ridge continuing on down without break or without bifurcating as far as it is shown in the latent. That is to say, as the finger was pressed, it was pressed not entirely down and only about so much of the finger shows? So, naturally, we cannot draw that which is not here.

[fol. 435] Now, another ridge intervening, I find a similar bifurcation, this point of the print being fairly clear, the smudged portion being in here, and one ridge intervening, coming down through here, and from this bifurcation which also comes down pretty well out of the pattern, that would be the eleven points of identity.

Q. Is that all you want to use the board for?

A. I do not want to—I would like to indicate, sir, that these ridges are continuous, but yet I do not want to be bound to point out a characteristic in a smudged area.

The Court: In other words, what you have done, Mr. Rogers, is to indicate on the blackboard by drawing lines in those that are clear and have not attempted to make an identification of those that are not clear? —

A. That is correct. Examining now this —

The Court: For the record, you are now using the rolled print enlargement?

A. No, sir. I am going to make the comparison now between the —

The Court: The card you have now in your hand, that is the one taken from the fingerprint card, the rolled print?

A. Yes, sir.

The Court: All right, just so we get the record.

A. As the judge indicated, I am going to call your attention now to the enlargement of the rolled or inked impression.

[fol. 436] The Court: That is the one that was actually taken by you from the defendant's finger?

A. Yes, sir.

The Court: Very well. You may proceed.

A. So that in examining the print we must find these various characteristics occur in the same relative position, and we find, then, examining the enlarged latent or questioned print with the enlarged print of the inked impression, which is known to be the right middle finger, we find that the delta formation—first of all, that it is above the loop type of pattern, that sixteen ridges intervening between core and delta, that the delta formation is formed by a letter “V”, which is indicated as point No. 1. Examining the known print, we find at that same location a point which may be marked as No. 1. Continuing with that same ridge toward the right, we find that that shows another ridge making a bifurcation, and that has been marked as No. 2. Going to the right at about 1 o’clock we find that there is a bifurcation upward, one leg of which continues up to the indistinct area of the questioned print, and the other part or fork joins again to the ridge here. We did not mark that as a point. We might have marked it as 12 or 13. We find that examining the known print, we find both those bifurcations, both are formations in the known print. No. 4 is an abrupt ending where a ridge seems to come down and end abruptly. Well, I marked it 4 here so that in this print, [fol. 437] moving over one ridge to the right, we find such an abrupt ending. The next ridge to the right is a fork or bifurcation upward. We find the same characteristic in the enlarged inked impression. Counting over to the right again with four ridges intervening, we find that the fifth ridge shows also an abrupt or rather a bifurcation upward. Counting over four ridges intervening here from point 5, we find at the same location a similar formation, bifurcation upward, and that has been marked as No. 7. Continuing over, the two ridges intervening, we find another bifurcation upward, which is No. 8. We find that the core formation in enlarged latent is rather bifurcated. We find the same formation in the known print and that has been marked as No. 9. Going over to the right at about 1 o’clock in relation to the hands of the clock, we find, with one ridge intervening, a bifurcation toward the left which is marked down on the board, and going further one ridge from the right in the known print we find at the same location the same formation; a bifurcation which has been marked No. 10. Still going to the right, with one ridge intervening now at about 1 o’clock or a little—maybe 2 o’clock—we find a bifurcation which has been marked 11,

and examining the known print at the same analogous point, the same identical location, we find a similar print which has been marked 11. I have indicated that this is an [fol. 438] island. It is not distinct enough to mark this as an entire point of comparison. I have now marked 11 points. There are many others which might have been marked.

Mr. Roll: I wonder, if your Honor please, if I could substitute the one counsel marked on, which was 31; and we have another one there I did not notice. I just wanted to substitute one for the other.

The Court: That is all right.

Mr. Roll: In other words, it is the same photograph of one of the other exhibits, and we do not want any marking on the one that is in evidence.

Q. Now, Mr. Rogers, the explanation which you have just given us, I take it, is the reason, then, for your conclusion that the two prints, that is the known print taken from the fingerprint card which you rolled, and the latent print, which is taken from this Exhibit No. 6, marked "C" thereon—

The Court: Being the door.

By Mr. Roll (continuing):

Q. —being the door, are one and the same print in so far as identity of individuals are concerned; is that correct?

A. My reason is that having examined the original print of the metal side of the door, and having enlarged that and compared it with the ring finger of the defendant, having compared the two and observed the characteristic points, it is my opinion that both of these prints were made by the right middle finger of the defendant.

[fol. 439] Q. Now, Mr. Rogers, I am going to direct your attention here to some other exhibits. I believe these have been marked 19-A, 19-B and 19-C. I will ask you to look at those as against the negatives which are 20. You have already examined 20; is that correct?

A. Yes, I think those are the same ones.

Q. Yes, those are the ones you had in your possession. Now, from your examination these are reproductions—strike that. 19-A, B and C, I believe, are reproductions of People's 20; is that correct?

A. That is correct.

Q. Now, I am going to direct your attention to People's Exhibit No. 28, and I will ask you to look at that, sir, if you will.

A. This is a photographic enlargement of 19-B.

Mr. Roll: 19-B. All right.

The Court: 29 I think is the exhibit you are looking for.

Mr. Roll: No. I think the one I wanted, your Honor, was the fingerprint card here that Mr. Larbaig made.

Q. With reference to People's Exhibit 29, will you examine that, please?

A. Yes.

Q. That is a—

A. Photographic enlargement of the right index, right middle and right ring finger of A. D. Adamson.

[fol. 440] Q. All right. Now, would you look at 28 and 29 and state whether or not—I will ask you to look at and make a comparison upon those prints shown on 28 and 29, and after you have made your comparison, I will ask you to state your opinion as to who the makers of those two sets of prints are, or maker.

A. I did not get the last part of your question, sir.

Q. You have made a comparison, have you?

A. Yes.

Q. Will you give us the results of your comparison?

A. The results of a comparison of Exhibit 28, which is an enlargement of the latent print, with Exhibit 29, which is an enlargement of the right index, right middle and right ring fingers of the defendant, shows that both impressions were made by the same person.

Q. Now, without going into too much explanation, would you please give us your reasons for that opinion, please?

A. Well, comparing the points again—shall I come down?

Mr. Roll: If your Honor desires to go into it—

The Court: I wonder whether we might not cover it in this way? Mr. Rogers, in making the comparison, you followed the same plan that you followed on the blackboard when you illustrated to the members of the jury?

A. That is correct.

The Court: Did you find points of identity in these Exhibits 28 and 29? Generally what were they?

[fol. 440a] A. Generally—

The Court: Don't go into any further detail than you can.

A. Generally speaking, the bifurcations, scars, abrupt endings and islands—one island, occur in the same relative position on both prints. These points of identity are the same in both exhibits, from which—that is to say, where there is a bifurcation and you find the same number of ridges intervening between that and the next point, those marked on these exhibits, and there being sufficient of these points, we must conclude that both impressions came from the hand of the same person.

The Court: You made reference in your answer to the subject of scar or scars. Just what do you mean by that, and what, if any, is the significance?

A. A scar ordinarily is not of great value in making a comparison; it is not always there; that is, the time interval during which the hand or finger has become scar-ed. But where it is in both imprints or impressions, it is additional proof or evidence. It is like another characteristic point. And it is the point that seems to be most obvious to a person who is not familiar with fingerprints. If it is in both prints it is a good point of comparison. But it is not necessarily to be used, because it may not be in both impressions.

The Court: By that you mean this: If you see two prints [fol. 441] that were otherwise apparently identical, and one showed a scar and one did not, the fact one did not show a scar would not mean anything?

A. No, sir.

The Court: But if you saw it present in both, it would be significant?

A. That is correct.

By Mr. Roll:

Q. I am going to show you here two other enlargements, People's Exhibit 27 and People's Exhibit 26, and also the small one, People's Exhibit 19-A, and I will ask you first with reference to 19-A. Is this People's Exhibit 26 an enlargement of 19-A?

A. Yes.

Q. With reference to People's Exhibit 27, I will ask you to look at it and state whether you—compare it with one of the rolled fingerprint cards and state whether or not it is an enlargement of one of the rolled fingerprint cards of the defendant?

A. That is the right ring finger—the enlargement is a photographic enlargement of the right ring and right little finger of A. D. Adamson.

Q. All right. Now, I will ask you the same question, sir, I asked you with reference to the other two enlargements, People's Exhibit 26 and People's Exhibit 27; if you will examine those and compare them, and when you have made your comparison state your—the result of your conclusion [fol. 442] to the members of the jury.

The Court: Had you previously compared them, Mr. Rogers?

[fol. 443] A. No, sir. Having examined People's Exhibit 26 and comparing it with People's Exhibit 27, it is my opinion that both the exhibits are—the portion of the exhibit which has been marked No. 26, and No. 27, were made by the right ring and right little fingers of A. D. Adamson.

By Mr. Roll:

Q. Now, will you state briefly the reasons for that?

A. Because a comparison of the characteristic points and their location, the location of those characteristic points within the prints, are sufficient to establish proof of identity.

Q. In so far, Mr. Rogers, as your appointment in this case is concerned, you were appointed by the court; is that correct?

A. Yes, sir.

Q. You have not consulted, or have you consulted with Mr. Larbaig concerning this whatsoever?

A. No, sir.

The Court: You really did not know what the case was about until it was handed to you?

A. No, I didn't know the circumstances of the case. In fact, I had forgotten the details of the case. I knew nothing of it until the court handed me the exhibits yesterday afternoon.

Mr. Roll: Would this be a good place to take our recess?

The Court: I think this would be a good place to take our [fol. 444] recess.

Mr. Roll: May I make this suggestion?

The Court: Yes.

Mr. Roll: I ask Mr. Rogers at the recess if it would be possible to take a photograph of his drawing on the board,

and he informs me it would be possible. If so, I would like to have it marked as an exhibit, that is, the photograph, so we may have that in the record here.

The Court: It may be a good idea to photograph the other blackboard also, as long as we have the cameraman up here.

By Mr. Roll:

Q. Will you do that, Mr. Rogers, so we can have it Monday?

A. Do you want it done today or tomorrow?

The Court: It will be time enough to have it Monday.

A. I will have it done tomorrow morning.

The Court: We will take our recess now until Monday morning at 9:30. The jury keep in mind the admonition heretofore given, not to talk about the case or form or express any opinion.

(Whereupon an adjournment was taken until Monday, November 20, 1944, at 9:30 o'clock a. m.)

[fol. 445] Monday, November 20, 1944; 9:30 o'clock A. M.

The Court: In the case on trial the record will show the jury, counsel and defendant present. You may proceed.

Mr. Roll: I do not see Mr. Rogers here, your Honor. I understand he was here early this morning. The bailiff informed me he was here at ten minutes to 9 and said he would be back here at 9:30.

The Court: He probably has been held up by something. We will just hold it a minute while we are waiting for him.

The Bailiff: Judge, one of the jurors would like to be excused for five minutes. She has a parcel down in the tax office.

The Court: All right, we will take a short recess. The jury keep in mind you are not to talk about the case or form or express any opinion. Take a short recess.

(Short recess.)

The Court. The record will show the jury, counsel and defendant present. You may proceed.

Mr. Roll: I think possibly, if the court please, it might be of advantage of all of us to move that over there against the wall.

The Court: Yes.

[fol. 446] Harry W. Rogers, recalled:

Mr. Roll: I would like to ask one or two more questions, if I might.

Direct Examination (resumed)

By Mr. Roll:

Q. Now, Mr. Rogers, with reference to People's Exhibit No. 6, there has been placed there on the diagram on the board there an indication that on the side below the knob the prints that were made would be the right ring and right little finger, and on the side of the hinges, that is on the face side of the door, it is the left index, left middle and left ring finger. Now, can you indicate—you can step down here if you want to—with a little piece of chalk, and we will just take—will you indicate, sir, with reference to the position of the fingers there, particularly with reference to the tip of the fingers, how the arch—these are the hinges, this is the knob. I have not put any prints on there at all. All I want is the position of the fingers, in other words, if the fingers are like this, with the tips here, or if they were up like this, do you see what I mean?

A. On this side, this portion here marked "C," the prints are off in that position, they are close together, off like that (illustrating).

Q. All right.

A. On this—

[fol. 447] Q. When you say about like that—

A. It is not in proportion, sir. You have the idea here (indicating).

Q. Well, the tips of the fingers, the end of the fingers in toward the center of the door.

A. That is correct, being these three fingers.

Q. Now, we will come over to the side of the door, being the side where the knob is. Does the same situation exist with reference to the right ring and the right little, are the tips in toward the center of the door?

A. That is correct, just like that (illustrating).

Mr. Roll: All right, I will mark "T" here and "T" here. You may cross examine.

[fol. 448] Cross-examination.

By Mr. Safier:

Q. Mr. Rogers, you are connected with the Sheriff's office of Los Angeles, are you not?

A. I am.

Q. In what capacity?

A. In charge of the Identification Bureau.

Q. I am sorry; I did not hear.

A. In charge of the Identification Bureau, with the rank of lieutenant.

Q. All your fingerprint work has been from the side of the prosecution, from the side of law enforcement, has it not?

A. I don't recall any case where I have actually testified in court for the defense, no, sir.

Q. Now, in the last analysis fingerprint identification is made from a comparison of fingerprints, isn't it?

A. That is correct.

Q. If you find a certain number of points which you call points of similarity, you make your identification from that, do you not?

A. Yes.

Q. It is also a fact, is it not, that fingerprint experts do differ as to whether or not one print might compare with another, do they not?

A. That is true.

[Vol. 449] Q. Now, how many points of similarity do you require, Mr. Rogers, before you would make an identification that the prints came from the same finger?

A. It depends upon the area of the pattern. If it is purely a delta formation, or any peculiar formation, a few points would do. We actually have in our department a rule we should show or mark at least ten points of identity.

Q. At least ten points of identity?

A. Ten.

Mr. Roll: I do not know whether the jurors were able to hear all of that. I do not know whether the microphone is on or not.

The Court: No.

A Juror: One answer I did not get at all.

Mr. Safier: May the reporter read back the last two or three questions, your Honor? The juror said they did not hear it.

The Court: If you will, please.

(Record read.)

By Mr. Safier:

Q. You would not make a positive identification from four points of similarity, would you?

A. If the four points of similarity were very peculiar, not in the field of the pattern or—I mean to say that if it were definitely a peculiar formation, I would say that it was the same person. However, it would be very difficult to prove that in court. For that reason we have established [fol. 450] the rule there must be at least ten points. It goes back to the mathematical figure of probabilities of positive identification.

Q. If you did find ten points of similarity in examining two prints, and any number of points of dissimilarity, would you still make an identification?

A. Well, you include both conditions. Theoretically, to prove two prints not alike you would have to have ten points of dissimilarity; that is, clearly—clear and distinct points not due to pressure or smudging, or was not definitely clear and visible points of dissimilarity, to prove that the prints were from two different fingers.

The Court: May I ask a question on that, what the witness means by dissimilarity?

Mr. Safier: Yes.

The Court: Going back to your blackboard diagram, you have indicated to the left of the core area, where the lines were not clearly decipherable on the questioned print; now, do you refer to that area as a dissimilarity?

A. Within that area, sir, there would be points of dissimilarity due to the fact that that area is smudged; it is not clear.

The Court: Now, another question. You have referred to distinguishing one print from another by the number of points of dissimilarity. When you referred to a dissimilarity you have answered that you referred to a smudged [fol. 451] dissimilarity or distinct dissimilarity in a pattern that you actually found to exist.

[fol. 452] A. Distinct dissimilarity in position of the characteristic points. That is to say, the bifurcations, abrupt endings and so on which are normally marked in making an identification, those distinct points of non-identity should be shown. That is to say that—if I might refer to the board again—just to the right of the core there is mark No. 10—if such a bifurcation occurred below that point, maybe in that same ridge but half an inch lower, if there was no bifurcation there that would be a distinct point of dissimilarity. If the core formation, which has a ridge that bifurcates downward and another print showed no such bifurcation downward, that would also be a point of dissimilarity.

By Mr. Safier:

Q. Given one latent print and one rolled print, Mr. Rogers, if you found ten points of similarity would you not then attribute the points of dissimilarity to some foreign substance in the latent print?

A. It might, it might be a foreign substance on the surface from which the latent print was obtained; it might even be a foreign substance on the finger of the person who left it there, and it might be due also to the fact that there was a difference of pressure. The inked impression to which you refer would be rolled evenly, but the pressure exerted in lifting an object, such as that door or a chair, or anything of that sort, would cause a difference in appearance due to the pressure exerted, so the differences may be due to the presence of foreign substance or also to the difference in pressure.

[fol. 453] Q. Well, if you had the ten points of similarity between the latent print and the rolled print, you would attribute any points of dissimilarity to some foreign substance or pressure, or something of that sort, wouldn't you?

Mr. Roll: I am going to object to that, if the court please, on the ground it is purely hypothetical. If he is referring to the prints here in-question I have no objection to it.

The Court: I will allow the witness to answer. Repeat the question, Mr. Reporter, please.

(Question read.)

A. That is correct.

By Mr. Safier:

Q. What system of filing do you employ in the Sheriff's office, filing of fingerprints?

A. Does the question refer to—

The Court: Classification, I think is what counsel means.

Mr. Safier: Yes, classification is the better word.

A. On the ten fingerprint card we use the Henry System as modified by the FBI at Washington; on the single fingerprints we use the Batley System of classification.

Q. Now, under your system in the Sheriff's office, if you had photographs of prints as taken from this door, how long would it take you to make an identification with a set of prints that you had already had on file?

The Court: I am afraid,—counsel will pardon me, I do not like to break into your cross examination, but I think [fol. 454] you are confusing identification and classification. I think your question is directed to this point: If this door, for example, had been presented to Mr. Rogers, how long would it take him to find out whether he had a fingerprint card that corresponded with those prints; is that the question?

Mr. Safier: I may reframe the question in that way.

The Court: Well, I think he has the idea.

By Mr. Safier:

Q. If this door were presented to you, Mr. Rogers, and you took the prints off the door, how long would it take you to make an identification if you had a corresponding set of prints in your classification in the Sheriff's office?

The Court: Assuming the classification was a regular fingerprint card, regularly filed in their regular file.

Mr. Safier: Yes, your Honor.

A. That would be difficult to say on the ten finger card. In the single print card it would be possible to classify the print which has been illustrated on the board because of the fact that the print is fairly complete. The other prints which have been referred to as—I don't know what they are referred to; but at the lower part of the door where there are two prints of the right hand and three of the left, those, because of the fact that the delta is not present,

it would not be possible to classify, so that in answering your question the print which is on the board could be classified [fol. 455] in two or three minutes. Going to the single fingerprint file, it might take as long as five or six minutes, to find that particular print, that is the inked impression with which this corresponded. If there were no card in the single print file, that is to say, if the person had not been in on a burglary, grand theft auto or various crimes of that kind, it would be an endless job to find that in the ten fingerprint card, in the file that contains the ten fingerprint cards.

Q. Now, if you took the prints from this door and sent them to the Federal Bureau of Investigation at Washington for identification, and assuming that they had on file corresponding fingerprints in Washington, how long would it take your office to have a report back?

A. At the present time, unless special request was made, it would take a matter of months. They are swamped with work back there. If it were sent by air mail—I don't know the situation here, sir, but if it were sent by air mail, with a special request, it might be returned in a period of five or six weeks.

Q. I see. Mr. Rogers, it is possible, is it not, to forge fingerprints?

A. To forge fingerprints?

Q. Yes.

A. No, sir, not in the sense—may I explain that answer? [fol. 456] The Court: Yes, I think you had better make your explanation because you cannot answer it in just a sentence.

A. In the sense that forgery, as ordinarily used, you cannot forge a fingerprint any more than you can forge anything else in nature, a sunset or anything of that kind, it just cannot be done. There is a method, however, and I don't know just what the word to describe it would be, but it is possible to copy a print and transfer that reproduction elsewhere. If you mean, sir, by forgery that process, the answer would be yes, but it is not a true forgery.

By Mr. Safer:

Q. But it would bear a great degree of similarity, Mr. Rogers, to the true print, would it not?

A. Somewhat. It has been done in laboratories. It has been done experimentally.

Q. Had you finished your answer?

A. I would like to answer further, if you will,—

The Court: I wish you would, Mr. Rogers.

Mr. Safier: Yes.

The Court: I suggest you go ahead. The question is one which does require more amplification. I am a little familiar with it.

A. All right, sir. Usually the method of those who wish to experimentally—many fingerprint men and scientists who are reputable and not dishonest, really reputable scientists, have made an attempt, for their own convenience, to copy fingerprints. The first publication to that [fol. 457] effect was a book by—published in book form by the authors Bessel & Wehde, the title of which was "Fingerprints can be Forged." The book is not important, I mean to say it is 150 pages, but the first hundred pages have to do with the history of fingerprints, and in the remaining portion of the book Wehde, who was a convict in Leavenworth, described a method of taking an inked impression—could I have a fingerprint card, any fingerprint card? (Receiving card.) Wehde was an experienced engraver and lithographer. He presented at the International Association for Identification, back in the year 1922, a system which he had of copying this fingerprint, making an engraved plate, which bore the ridge surface, bifurcations, and was, in fact, an exact copy of the ridges as they appear in, we will say, this right thumb. Then he made enlargements of it so that his enlarged print then was four steps removed from the original, or that is to say the first was a negative, there was a print which was again copied, and the enlargement made from that, and he submitted these prints, one that he had copied—photographic enlargement of the one which he had copied, a photographic enlargement of the inked impression, and said that it would not be possible to distinguish between the two. Incidentally, that went back to an old German method that had been done years before but apparently not published. However, the Committee of Identification [fol. 458] officers to whom that was submitted were able to identify the true print and the spurious print. The assumption was this,—nevertheless, they went ahead and published the book, and we have had to consider it—the assumption was this, if that could be done it would be

possible to place that print on a particular object, such as that door or anything else, to throw suspicion upon an innocent person. It would be necessary to secure in some method the print of the person involved and then, with the use of this—I want to get this clear, there are other methods besides this—it would be possible, however, to have a rubber finger stall and copy those ridges on that finger stall; it would be possible to make the matrix of any gelatine like substance which would take the impression from which it could be hardened and from which a matrix could be made. Now, with that digression, we will go back and say that under this procedure it would be possible then, for me, for example, to obtain the fingerprint of any one of you made as you touched the railing there, the water glass or something else, or if I had access to that fingerprint card, to copy it from here and then transfer that copied print to that door, the assumption being that they could not be detected. The difficulty is, or the reason why most of them—spurious prints are detected, is because they are too perfect. In Laboratory work, those who have published results of their experiments, it is noted that the [fol. 459] latent print is too perfect. I do not like to inject the personal element in court witness testimony, and yet, for the purpose of illustration, I might say that I personally have detected two such spurious prints, one of which, fortunately, was before the case went to trial, and not by any of our local fingerprint men, and the other case had, however, at the time I got into it, had gone to trial.

[fol. 460] And in both of those instances the job was too perfect. I will say for the benefit of defense counsel and all others, that if it were possible to make—to make an exact copy of the prints which I have placed here, showing all the imperfections it might get by, although there is one other feature beside the perfection, and that is that nature's oil or the body salts that is exuded through the pores of the skin cannot be duplicated. You might rub that rubber finger stall or matrix over an oily surface or over your hair to get a little oil on it and put it on that door or somewhere else, but it wouldn't be very successful. It will not show—may I use the board, sir?

The Court: Yes.

A. I have touched a part of that and you can see the imprint of my fingers, and the chalk has adhered to the

ridge surfaces where nature's oil or body salts has been exuded from the pores. A similar action takes place when powder is dusted on any object or on that door, for instance. And that is what has happened, the powder has adhered to the ridge surfaces.

Mr. Safier: Mr. Rogers want to know if he can show that to the jury again?

The Witness: Is it desirable to show that to the jury?

Mr. Roll: I think it probably would be.

The Court: I think it would be interesting, at least make the testimony a little more concrete.

[fol. 461] The Witness: I think it would explain the point that we are trying to bring out as to copying prints.

Mr. Roll: I do not know whether it might be easier for them to file around and look at it.

A. The point we are trying to make, sir, is the difficulty that a person would have in trying to copy or to present a spurious print. In the language of some authors, and that is which is known—

The Court: I think I realize the difficulty you are under, Mr. Rogers, because you are dealing with a group of ladies whose knowledge of fingerprints is very limited. I will allow you to handle it in your own way, Mr. Rogers. After all, that is probably the fairest way of doing it. Do you have any suggestions as to how you could bring the knowledge home to the jury?

A. One other thing that might be done to present the point, possibly, would be to develop an actual print, and then you would have the same difficulty of bending over and observing it. If it is not important, sir, we will omit it.

The Court: Perhaps we better take another question.

The Witness: I beg your pardon?

The Court: Perhaps we better take another question.

The Witness: Perhaps he better ask one?

The Court: Yes.

By Mr. Safier:

Q. Have you finished your answer?

A. I hadn't finished the question of copying prints. It [fol. 462] is a rather long and involved process. If you wish to bring out any particular point, however—

Q. Well, I simply want to know, Mr. Rogers, whether it was not possible to forge a print, and I think you have answered that, at least, in so far as necessary. It follows, then, does it not, that given a true rolled fingerprint of an individual one could through some process put that fingerprint on some other object, could they not?

A. Yes. They would have to make from that matrix of some kind to copy it—I mean, from which a reproduction could be made. It is—

Mr. Roll: Go ahead.

By Mr. Safier:

Q. Were you going to say something else?

A. What I was going to say probably is repetition of what I have already said.

Q. You testified, I think, that upon two occasions you discovered spurious prints; is that correct?

A. Yes.

Q. Was that in connection with some criminal trial, Mr. Rogers?

A. Do you mean criminal case or criminal prosecution?

Q. Criminal prosecution.

A. In one case the case was actually prosecuted, and the second case it was not, because it was discovered in time. Both involved a criminal offense, however.

[fol. 463] Q. Were those spurious prints made by some law enforcement agency?

A. No, sir.

Q. Now, getting down—

The Court: Were they very good jobs?

A. They were too good, too perfect.

[fol. 464] The Court: In other words, could you put it this way, Mr. Rogers: That in order to simulate or, use the slang expression, fake a fingerprint of one person and put it on a piece of material, would you say it required an extremely high degree of skill to be at all apparently successful?

A. Yes, it would.

By Mr. Safier:

Q. Mr. Rogers, the other evening you took a set of rolled prints from the defendant, did you not?

A. I did.

Q. And he voluntarily let you take these prints; he had no objection, did he?

A. That is correct.

Q. And did you make your own photographs from the prints on the door, or did you use the photographs of the prints on the door?

A. No, sir, I used the negatives which had been taken by the person who investigated the case.

Q. I have here People's Exhibits 31 and 32, 31, I believe, is a rolled print, is it not?

A. That is photographic enlargement of a rolled print, yes, sir.

Q. Exhibit 32 is a photographic enlargement of a print from the door?

A. It is.

Q. Now, I will ask you, Mr. Rogers, if in examining, which way does it go? This way?

[fol. 465] A. That is right.

Q. I will ask you if in examining those prints, those photographs of prints, rather, whether or not you found any points of dissimilarity?

A. Yes, points that are dissimilar because of pressure or smudging.

Q. Will you indicate what points of dissimilarity you found on there?

A. In this area here there are—

Q. Just a minute, Mr. Rogers.

Mr. Safier: May Mr. Rogers step down and point it out in front of the jury, your Honor?

The Court: Yes.

A. For instance, counting up from the delta formation, one, two, three, four, five, six, we find here—may I take another copy?

By Mr. Safier:

Q. Yes.

A. I just don't want to mark up a court exhibit.

Mr. Safier: Have you another copy, Mr. Clerk?

The Clerk: Of what?

Mr. Safier: Of these prints?

The Clerk: No, sir.

The Witness: Is it all right, sir, to mark the court exhibit?

The Court: I think Mr. Roll has—

Mr. Roll: I have a set, and I gave counsel a set also. [fol. 466] Here is another set.

The Court: Defense counsel has a set and Mr. Roll has a set.

Mr. Safier: Yes. I think I left my set in the office.

The Court: Just for the record, Mr. Rogers, use the set which Mr. Roll has given you.

Mr. Roll: Do you want that marked in evidence?

Mr. Safier: Well, I think maybe we better have it.

The Court: I think it would be better to use it rather than the regular exhibit, because we might get too many marks on there and we might get confused. All right, Mr. Rogers, use Mr. Roll's set.

A. Well, taking this as the point of the delta in each print, going up here, one, two, three, we find the point there that agrees with this point here, bifurcation. To follow this on further, we find that those two ridges which have bifurcated apparently come together again and form an island. However, in this print they go on up, and they seem to be open here, not joined. So it seems to be a point—instead of an island, as it appears in those prints here, it seems to be a point at that point. Of course, the fact that whoever pushed against that core exerted more pressure on that finger or this finger, rather, than was given or was put on it at the time the finger was rolled. So it is an explainable difference. I am unable to find in this print, sir, unexplainable differences. There are many [fol. 467] such cases as this. I start at this point and count up to this point, six ridges, and speaking of the hand of the clock, about 11 o'clock, counting up here, one, two, three, four, five, six we do not see that that is joined together. But again it is due to the fact that more pressure was exerted.

By Mr. Safier:

Q. Well, are there any other points of difference?

A. Not unexplainable, no, sir.

Q. You would have an explanation for all your points of difference as long as you find your ten points of similarity, would you not?

A. It is very likely; I haven't examined it carefully.

Q. And all your explanations as to these points of difference is merely supposition and conjecture on your part, isn't it?

A. It is rather theory as to what happened to cause that apparent dissimilarity.

[fol. 468] Q. Well, it is conjecture, guesswork and supposition as to what happened?

A. If you want to call that conjecture and guesswork, yes.

Q. You do not know actually what did cause it?

A. No, we do not know what actually happened; we didn't see it happen.

Q. As a matter of fact, there appears to be a difference in the core itself, doesn't there?

A. That is correct.

Q. Of course, you have an explanation for that difference in the core too, haven't you?

A. In the core formation it is a little difficult at first to see the similarity or exact identity of the two cores, because of the fact that the pressure has joined one or two ridges just above the core formation. But I can explain that, sir, as being due to pressure.

Q. That is simply a guess on your part, however, the difference being due to pressure, isn't it, Mr. Rogers?

A. A theory as to how or to what caused it, it certainly would be a guess in the sense that we did not see it done.

Q. You would attribute all the differences in the two prints to these various things, such as pressure and so forth, simply because you have found the eleven points of similarity in the prints?

A. There are eleven marked; there were more than that; eleven were marked. There is also this to be said, sir, that the area is—does not show as much finger, therefore, the differences due to the fact that the rolled impression shows the complete ridge surface.

Q. In comparing the rolled prints with the other—with the photograph of the other prints upon the door, did you also find points of dissimilarity?

A. Comparing the rolled prints with what?

Q. You had some other prints from this door that you examined, did you?

A. Yes.

Q. And you found—of which you made a comparison with the rolled prints that you took of the defendant; is that right?

A. That is correct.

Q. In connection with those prints did you find points of dissimilarity as well?

A. The same type, those that were due to a difference of pressure or foreign substance.

Q. That is, you attribute those points of dissimilarity to these various things?

A. That is right.

Q. Difference in pressure and foreign substance?

A. That is right.

Q. Given any two set of prints, Mr. Rogers, if you find ten points of dissimilarity, would you attribute all the points [fol. 470] of dissimilarity to some foreign substance, difference in pressure or something of that sort?

A. If you find ten points of similarity, although the proper word, possibly, should be identity, and do not find as many as ten points that are not identical, then you must assume that both prints came from the same finger. In other words, in making your examination you have got to not only look for those points of identity which appear in the same position, but you must also look to see if there are not—that there are no definite or distinct characteristics that are not in agreement.

[fol. 471] Q. I see. Mr. Rogers, how many years did you say you have been engaged in fingerprint work?

A. It will be sixteen years on the 1st day of December.

Q. In that length of time has it ever come to light that you made a mistake in identification in any case?

A. Not in a court case, no, sir.

Q. Well, regardless of whether it was a court case or not.

A. Oh, yes.

Q. The answer is "Yes"?

A. I beg your pardon?

Q. I say, the answer is "Yes"?

A. I would like to explain it, if I may.

The Court: You may.

A. The most common mistake that the fingerprint man makes, possibly, is in comparing a photostatic copy rather than a photographic copy, and there is the difference here that it is white on black instead of black on white, as it

is there, so that possibly the most serious mistake that I made was in overlooking that fact and saying that two prints were not identical when, actually, they were, when the white exhibits were checked against the black to indicate. Ordinarily identifications of latent prints are not the opinion of one person. Before the Department—and I believe this is true of most departments—there must be an agreement between two of the fingerprint men and possibly the [fol. 472] fingerprint man who did the work and his superior. The work is checked in our department, and I think most of the departments, before it is presented.

Q. Can you make an identification from the print of one finger, Mr. Rogers?

A. Can I make the identification from the print of one finger?

A. Yes.

A. Yes, if there is sufficient ridge surface there.

Mr. Safier: I think that is all.

Redirect examination.

By Mr. Roll:

Q. Mr. Rogers, counsel asked you if you took some photographs, as I understand his question, of the prints on the door, and your answer to that was no, that you received the negative, the three negatives, which you testified to on direct examination; that is correct, isn't it?

A. Yes. I received from the court certain negatives, six in all, three of which were negatives of latent prints and the other three of inked impressions.

Q. Now, in so far, Mr. Rogers, as three of these negatives of latent prints are concerned, did you actually, physically, take those three negatives and check those negatives against the actual prints which appear here on the door?

[fol. 473] A. I did.

Q. And after checking them can you state that those negatives are the actual negatives of prints from this door?

A. That is correct.

Q. Now, counsel spent considerable time this morning on cross examination about the subject of the possibility of simulating or forging fingerprints. From your examination in this case did you find any evidence whatsoever of any simulation, forgery or anything of that kind or nature?

A. Not at all; no, sir.

Mr. Roll: No further questions.

Mr. Safier: That is all.

Mr. Roll: May Mr. Rogers be excused now, your Honor?

The Court: Yes.

John B. Larbaig, recalled:

Mr. Safier: There are one or two questions I want to ask of Mr. Larbaig, your Honor.

The Court: Yes.

Cross examination (resumed)

By Mr. Safier:

Q. Mr. Larbaig, in your opinion, can fingerprints be forged and transplanted from one place to another?

Mr. Roll: Just a moment. Do you mean successfully or otherwise?

[fol. 474] The Court: Well, let's take one step at a time. You may answer the question.

Mr. Safier: I will let my question stand.

The Court: Yes, you may answer the question. I think we understand what we are getting at.

A. No, I do not believe they can successfully.

By Mr. Safier:

Q. Have you ever seen any spurious fingerprints?

A. I believe I have seen one.

Q. There have been efforts, have there not, to take fingerprints from a true set of prints and transplant them to some other object?

A. No, not that I know of myself personally.

Q. Just one other question, Mr. Larbaig: You have testified that you have been engaged in this type of fingerprint work for how many years?

A. Approximately thirteen years.

Q. Thirteen?

A. Thirteen.

Q. Now, in all of that time has it ever come to light that you have made a mistake in identification?

A. I have.

Q. Mr. Larbaig, assuming that you were given a set of prints as taken from this door, and assuming that you had on file in the Police Department a set of prints that corresponded thereto, how long would it take you to make an [fol. 475] identification?

Mr. Roll: Just a moment. I am going to have no objection to it if you will make it on a hypothetical basis, but if you are making it on the basis of what actually occurred in this case, I intend to go into the whole situation, if the court please, as to how it is done to get the prints, and with that forewarning—

The Court: Suppose you make it a little more specific. It is rather general at the present time.

Mr. Safier: I ask it in the form of a hypothetical question.

The Court: May we have the hypothetical question? I think it probably should be amplified.

Mr. Safier: I am going to assign Mr. Roll's remarks as misconduct in this case.

The Court: The jury is instructed to disregard the remarks of counsel. May we have the question, Mr. Kennelly?

(Question read.)

A. I take it for granted you mean no more than we have on this door? Do you mean three fingers or less?

The Court: You have a door there, Mr. Larbaig, and you have a fingerprint card. How long would it take you to arrive at the conclusion whether the fingerprints on the door were the same prints on the fingerprint card, or not?

A. Well, if we had ten prints of the door, if we could get a complete set of fingerprints from one hand,—

[fol. 476] The Court: I don't think you get the question yet. May I rephrase it: Suppose I handed you the fingerprint card of the defendant, also handed you this door and you start cold, in other words, I simply asked a question, as we put it here to Mr. Rogers, can you tell us whether these prints are the prints of the same person or not? How long an examination would you have to make in order to determine whether they were or were not the same?

A. Oh, I could determine that in a very few minutes.

By Mr. Safier:

Q. Now, assuming that you had a set of prints as taken from the door and sent them to the Federal Bureau of Investigation in Washington, and assuming there was on file there a complete set of prints that corresponded to the prints on the door, how long would it take you to get a report back?

A. When you mention a set of prints on the door, how many do you mean?

Q. Just the same number as were taken from the door.

A. At this time say the most three?

Q. Very well.

A. I doubt very much if we would hear from that for months.

Mr. Safier: I have no further questions.

[fol. 477] Redirect examination.

By Mr. Roll:

Q. Mr. Larbaig, generally now with reference to persons that are arrested, we will say, by the Police Department, a set of prints is taken; is that correct?

A. That is correct.

Q. On a fingerprint card; is that true?

A. That is true.

Q. With reference to the classifying and filing of these fingerprint cards in the Police Department, what is the condition at the present time with reference to whether you are up on the filing or back on the filing?

A. On the complete sets of fingerprints, all ten of the persons arrested, the filing is up to date, that is being done daily and continually at all times, but the single fingerprints in our Bureau are in arrears, oh, I would say in the neighborhood of three to three and one-half years.

Q. Why is that?

A. The manpower shortage mostly, and we just have so much other work we cannot get to them.

The Court: And you lost a couple of unusually good men within the last few years, too, haven't you?

A. That is true.

Mr. Roll: No further questions.

Mr. Safier: That is all, Mr. Larbaig.

[fol. 478] Mr. Roll: May I just ask one other question:

Q. Counsel asked you some questions about the simulating or the possibility of forging of fingerprints. From your examination of these prints is there any possible evidence whatsoever that any forgery or simulation has been made of these prints on that door?

A. No, sir.

Mr. Roll: That is all.

Mr. Safier: That is all.

Mr. Roll: May Mr. Larbaig now be excused?

The Court: Yes.

E. J. Long, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. E. J. Long.

Direct examination.

by Mr. Roll:

Q. Your name is E. J. Long?

A. Yes, sir.

Q. You are a police officer of the City of Los Angeles?

A. I am.

Q. Attached to what division, Mr. Long?

A. Wilshire Detective Bureau.

[fol. 479] Q. Were you working at that division on the date of the 25th of July, 1944?

A. I was.

Q. And did you receive a call to go to an apartment located at 744 South Catalina Street on the evening of that date?

A. I did.

Q. About what time did you arrive at that apartment, Mr. Long?

A. About 8 p. m.

Q. Did you see the lady who testified here, the landlady?

A. I did.

Q. With reference to apartment 410, how did you gain admittance to that apartment?

A. The landlady of the apartment gave me the passkey that she had. I went up to the apartment and put it in the door and opened it and went in.

Q. And did the landlady accompany you up there, or not?

A. No, she did not.

Q. Now, with reference, Mr. Long, if you now recall, did you see any newspaper around the apartment?

A. I did.

Q. And where was it when you first saw it?

A. It was laying on the floor outside of the door in the hallway.

Q. Do you remember what you did with the paper?

[fol. 480] A. I picked it up and took it into the apartment.

Q. Let me show you People's Exhibit 17, showing the position of an armchair, with some articles on it: do you recall that that is the place you placed the newspaper there on the arm of the chair (handing photograph to witness)?

A. I think it is. I am not positive that it was placed there, but I think I placed it there.

Q. Now, at the time you went into the apartment, Mr. Long, do you remember whether the lights were on or off at that time?

A. I don't remember.

Q. With reference to the folding bed in the apartment, was that folding-bed down or up?

A. It was up.

Q. In other words, you could not see it in the room?

A. No, it was not.

Q. Now, did you go into the kitchen of the apartment?

A. I did.

Q. And did you see this door which has been marked People's Exhibit 6?

A. Yes.

Q. Where was that door, Mr. Long?

A. It was leaning up against the sink in the kitchen.

Q. I show you here People's Exhibit No. 18, and I will ask you to look at that and state whether or not that fairly represents the relative position of People's Exhibit [fol. 481] 6 there in the kitchen at the time you were there?

A. It is in the same relative position that it was when I first observed it.

Q. With reference to the newspapers there, were they there when you first saw it?

A. No, they were not.

Q. With reference to which way the door was facing, that is, whether the knob of the door was out or in, can you tell us or do you remember?

A. I don't remember.

[fol. 482] Q. Now, I show you People's Exhibit 8 and I will ask you to look at that photograph and state whether or not that fairly represents what you saw there on the living room floor, the condition of Mrs. Blauvelt and what you saw at that time?

A. It is except the first part of the person that shows in the picture was not there at that time.

Q. And these pillows which are shown there, were they in that position, sir?

A. Yes, they were.

Q. With reference to what you did when you got in the apartment there, Mr. Long, will you just tell the court and the members of the jury what you did, sir?

A. When I first went in the door I seen the person laying on the floor and I went over and lifted up the pillows to see whether the person was dead or not, and after I had ascertained that the person was dead, and I wanted to see whether it was a suicide or murder,—I came to the conclusion that it was a murder, and I immediately then went to the telephone and called the Scientific Laboratory, the Homicide Squad, Mr. Brennan and Mr. Wiseman that handles the homicides in the Wilshire Detective Bureau, and also Capt. Rasmussen and I waited there until they came.

Q. Now, with reference to a fingerprint man, was there a fingerprint man called?

A. Yes, he came from the Scientific Laboratory.

[fol. 483] Q. With reference to the kitchen there where this door is located, while you were there did anyone move or touch that door until the fingerprint man came that you know of?

A. No, there was nobody—

Mr. Safer: Just a moment, just a moment.

The Court: Just a moment. Let me have the question again.

(Question read.)

The Court: The objection is overruled.

A. No. I stayed in the hallway between the kitchen and the front room and there was nobody went in there until they came.

By Mr. Roll:

Q. Now, with reference—you say you moved the pillows. After you moved them did you put them back?

A. I did.

Q. Put them back in the same position?

A. The same way they were when I first went in there.

Q. Now, with reference to the pillows, at the time you removed them did you see anything on the pillows at all?

A. Yes.

Q. Will you describe what you saw, what the appearance of it was and where it was located?

A. On the lower side of the upper pillow there was a brown spot on that that appeared to me to be blood, and it was on top of the other pillow that was underneath it. [fol. 484] On the pillow that was underneath it there was no blood between—on the upper side of that pillow.

Q. Now, how about that pillow that was next to the face?

A. The pillow that was next to the face was a soft pillow and it had blood on it on the under side.

Q. Now, so that we may—I will just use these two exhibits for the purpose of illustration. These will indicate, Mr. Long—well, we will let this be, this portion right here, be the face of Mrs. Blauvelt for the purpose or this illustration merely. This will be the first pillow.

A. Yes.

Q. This will be—I will put the second pillow crossways so you can see a little better. Now, if I understood your testimony you picked up the first pillow and you saw a brown substance on the bottom side of the first pillow; is that correct?

A. That is right.

Q. Which gave the appearance of blood?

A. It did.

Q. With reference to the then remaining pillow on the top side of the remaining pillow I believe I understood your testimony to be that there was no blood on the top side of the remaining pillow?

A. That is right.

Q. Then after you lifted the remaining soft pillow off you did see a substance there on the soft pillow which gave [fol. 485] the appearance of blood; is that correct?

A. Yes, sir.

Q. Now, from your examination of the substance which appeared to be blood what would you say with reference to it being wet or dry or the condition of it?

A. It was dry.

The Court: I think we might take our morning recess at this time. The jury will keep in mind the admonition heretofore given. We will take our morning recess.

• (Short recess.)

The Court: The record will show the jury, counsel and the defendant present, and the witness on the stand. You may proceed.

Mr. Roll: I have a photograph which I will ask to be marked People's Exhibit next in order, your Honor.

The Court: The next number is 33.

By Mr. Roll:

Q. I am going to show you People's Exhibit 33, Mr. Long, and ask you if after the garments which are depicted in People's Exhibit No. 8, that is the coat and the two pillows which you have described in your testimony there, were removed, if this fairly represents the upper portion of the body of Mrs. Blauvelt?

A. It does.

Q. And I notice that there is some object there in the general location of the neck on the photograph, right here.

A. That is a dish rag, I think.

[fol. 486] Mr. Roll: I will offer this as People's Exhibit 33.

The Court: Marked 33 in evidence.

By Mr. Roll:

Q. This is the object here that I pointed at?

A. Yes.

Mr. Roll: This is the object which the witness says "is a dish rag, I think," (exhibiting to the jury). You may cross examine.

Cross examination.

By Mr. Safier:

Q. Officer Long, what time did you arrive at apartment 410?

A. About 8 o'clock p. m.

Q. On July 25th?

A. On the 25th.

Q. Who went with you?

A. Sergt. Woodhall.

Q. Anybody else?

A. No.

Q. Was anybody in the apartment when you arrived?

A. No, there was not.

Q. And the landlady let you in with her pass-key, did she?

A. No, sir.

Q. How did you get in?

A. She gave me her pass-key down in her apartment. She said she did not want to go up there.

[fol. 487] Q. I will ask you whether or not at the time you arrived at the apartment the hall door to the garbage disposal compartment was open or closed?

A. I think it was closed; I don't remember.

Q. When you entered the apartment were the lights on or off?

A. I don't remember.

Q. Were you the first to enter the kitchen?

A. Yes.

Q. When you entered the kitchen was the kitchen door to the garbage disposal compartment unhinged from the compartment itself?

A. It was.

Q. And was standing in the position indicated on that photograph?

A. The same relative position, yes.

Q. As indicated on People's Exhibit 18; is that correct?

A. Yes.

Q. Were the black markings around this door there at that time?

A. No, they were not.

Q. Who put the newspapers under the door?

A. I don't know who put them under the door.

Q. Were they under there when you arrived?

A. No, they were not.

[fol. 488] Q. In other words, the newspapers that appear to be under that little door, as appears on Exhibit 18, were not under the door at the time you first saw it?

A. No, sir.

Q. Now, you will observe in the upper compartment garbage disposal section there appears to be some things on the shelf. Can you tell us what they are?

A. I think they are—they are a number of paper bags, used paper bags, that was put in the upper compartment.

Q. Was that the condition of that upper compartment at the time you arrived?

A. Yes.

Q. It had those things in there?

A. Yes.

Q. You testified you carried the newspaper from the hallway inside?

A. I picked it up in the hallway and took it in the apartment.

Q. Was the little chain fastening on the door, on the door to the apartment, fastened or unfastened when you arrived?

A. It was unfastened.

The Court: Which door, Mr. Safer?

Mr. Safer: The large door from the apartment to the hall.

Q. Now, you observe something white underneath the [fol. 489] shoes, as it appears in People's Exhibit 17; can you tell us what that is?

A. No, I couldn't tell you what it is.

Q. Can you state it was there at the time you first entered?

A. I don't know; I don't remember.

Q. Was the purse and packages, as appears on this Exhibit 17, in the same position in which they are now appear to be, at the time you entered?

A. The package that shows on the chair is two or three ears of corn in a package, and the purse is open and the contents of the purse had been emptied out partially, and the coin purse was standing open. And next the chair—it does not show on that picture—on the side next to the door was another package that contained some canned goods.

Q. Had you finished your answer?

A. Yes.

Q. Did you handle the shoes and parcels at all?

A. No, I didn't. There was a bunch of beads on the floor here too that I seen at that time.

Q. When you first saw the body were the arms exposed?

A. Yes..

Q. Both arms?

A. One was more than the other.

Q. Which arm was exposed more than the other?

A. The left arm.

[fol. 490] Q. In which position was it?

A. It was practically horizontal—not horizontal—at right angles to the body.

Q. In which position was the right arm?

A. It was kind of up over the right breast.

Q. Did you observe whether or not there was a watch on the wrist of the left arm?

A. Yes, there was.

Q. Was it a gold watch?

A. I don't know whether it was yellow gold or just what-kind of a watch it was; I didn't pay any attention to the kind of watch it was or anything.

Q. Could you state whether or not it was a diamond or jewel studded watch?

A. I couldn't tell you.

Q. Did you remove the watch?

A. No, I didn't.

Q. Were there any rings on the fingers of either hand?

A. I did not pay any attention to the hand to see whether there was any rings on or not.

Q. You could not state whether there were any on or not?

A. No, I couldn't say.

Q. Now, you found two pillows on the face, you testified?

A. Yes.

Q. Were they pillows that appeared to be from the davenport [fol. 491] port or from one of the chairs?

A. The upper pillow appeared to be off a chair.

Q. I see? How about the lower pillow?

A. It was just a soft pillow, and it was from some other place in the room; I don't know where it was from.

Q. I see. It was not a pillow that came from one of the cushions of the davenport or chair?

A. No, it looked like an extra pillow.

Q. How long did you remain in the premises?

A. Over two hours.

Q. Shortly after you arrived there some other police officers arrived?

A. Yes.

Q. Who arrived?

A. There was McGarry, and Brown from the Homicide Squad, and Puthoff, of the Scientific Laboratory, he is a photographer, fingerprint men, and Capt. Rasmussen, Mr. Wiseman and Mr. Brennan, from the Wilshire Detective Bureau.

Q. Was the body removed that same evening?

A. I wasn't there when the body was removed.

Mr. Safier: That is all.

[fol. 492] Mr. Roll: Just one other question if I may, Mr. Long.

Redirect examination.

By Mr. Roll:

Q. You testified with reference to the photograph counsel was showing you,—he was asking you about the package there, and he showed you People's Exhibit No. 17, and you said there was another package which is not shown in People's Exhibit 17. I now show you People's Exhibit 11 and ask you if you can see just the edge of what appears to be a package to you?

A. Yes, right on the right of the chair.

Q. The one you testified to prior is the one out here?

A. Yes.

Q. That is the one I think you said there was some corn in?

A. I think there was two or three ears of corn and the other was some canned goods and a half pound of butter or a quarter pound of butter.

Mr. Roll: (Exhibiting to jurors.) Here is People's Exhibit 17 and here is People's Exhibit 11, the one described, and this is the package over on the edge. That is all, Mr. Long.

The Court: Just one question, Mr. Long: What is the fact as to whether or not you moved anything in or about the place before the other officers arrived?

A. No, there was nothing moved by me, nor did I permit [fol. 493] anybody to move anything until the other officers arrived.

The Court: That is all.

Mr. Safier: That is all.

Mr. Roll: That is all. May Mr. Long be excused now, if the court please?

The Court: Yes.

Mrs. MARIE MASSEY, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: What is the name, please?

A. Marie Massey.

The Clerk: Mrs. Marie Massey?

A. Yes.

Direct examination.

By Mr. Roll:

Q. Your full name, please?

A. Marie Massey.

Q. Where do you live, Mrs. Massey?

A. 744 South Catalina.

Q. Are you the daughter of the lady who was the manager there of the apartment house?

A. Yes, I am.

Q. You live there in the same apartment, do you?

A. Yes, sir.

[fol. 494] Q. You live in the same apartment with your mother or a separate apartment?

A. With my mother.

Q. Directing your attention to a lady by the name of Mrs. Blauvelt: Did you know Mrs. Blauvelt during her lifetime?

A. Yes, I did.

Q. Did she occupy apartment 410 there in the last approximately a year prior to the 24th day of July?

A. Yes, sir.

Q. And directing your attention now to the date of the 24th of July, 1944, sometime along in the afternoon of that date, did you have occasion to see Mrs. Blauvelt?

A. Yes, I did.

Q. About what time would fix that, please?

A. Well, I could not say exactly; between 2 and 3:30; probably 2:30 to 3:30.

Q. Where were you when you observed her?

A. Well, I was just coming out of our apartment and our apartment is facing the lobby, and she was going through and we spoke together quite a few minutes.

Q. I cannot hear you.

A. She came in and I was just in front of our apartment, in the doorway; she came through and we spoke for a few minutes and then she went on. She was going to take the elevator and she met mother and spoke with mother a few [fol. 495] minutes. She must have been with us about 10 or 15 minutes.

Q. Did she have some packages?

A. Yes, sir.

Q. Was that the last time you saw her alive?

A. Yes, sir.

Q. Your mother was there at that time?

A. Yes, we were both there.

Q. With reference to her clothing, can you describe with reference to whether or not she had a coat on?

A. Yes, she had her coat and her hat. She always wore coats and hats whenever she went even to the grocery store.

Q. Do you recall the color of the coat?

A. It was navy blue and the little hat was navy blue, trimmed in a light blue.

Q. I am going to show you a photograph particularly of the sleeve of a coat. Does that appear to be it?

A. Yes, it was a plain coat, no fur on it.

Q. That is People's Exhibit 33. In this conversation that you had with her there was there anything said by Mrs. Blauvelt whatsoever as to anything wrong with her apartment or the little garbage disposal door?

A. No, there was not.

Mr. Safier: Just a moment. I object to any conversation.

The Court: The objection is sustained and the answer stricken out.

[fol. 496] By Mr. Roll:

Q. I will ask you this and you can answer yes or no: Did she make any complaint to you about anything?

A. No, sir.

Q. Now, directing your attention to that day, and earlier in that day, do you know whether or not the back door of the apartment which leads out into the alley was open or not?

A. Yes, it was.

Q. How do you know that?

A. Because I spent most of the morning and early afternoon out there myself.

Q. Where?

A. Well, I did quite a bit of washing and the washroom is in the basement.

Q. Where is the washroom located?

A. It is in the back of the building in the basement.

Q. Downstairs in the basement?

A. Yes, and then I went up the stairs to the first floor and went out and hung my clothes outside and I did that several times because I washed several blankets.

Q. Were you in your own apartment at any time during that afternoon?

A. Yes, between—I imagine 1 to probably 4.

Q. I don't know whether you understand my question or not with reference to your own apartment?

A. Yes.

[fol. 497] Q. Did you go in your own apartment?

A. Yes, about 1:30, I should judge.

Q. How long did you stay in your apartment?

A. Well, I imagine until about 4 o'clock, probably.

Q. Now, where were you when you saw Mrs. Blauvelt?

A. I was right in front of the door that leads to my apartment.

Q. So you were not in the back end of the apartment during that time?

A. No, but the door was open, it was wide open. We leave it to have a little fresh air to the hallway.

Mr. Roll: You may cross examine—oh, just one other question, I am sorry, counsel, if I may ask this question:

Q. With reference to the keys to the apartment house there other than the pass-key, do I understand you correctly that each tenant is furnished with a key to their apartment?

A. Yes, sir.

[fol. 498] Q. And that same key will open the front door?

A. The front and back door.

Q. The front and back door. Their key, so far as their respective keys are concerned, is only good to the individual apartment?

A. Yes, sir.

Q. Now, did Mrs. Blauvelt have a key?

A. Yes, sir.

Q. Have you ever located that key?

A. No, none of us have.

Mr. Roll: Cross examine.

Cross-examination.

By Mr. Safer:

Q. What date was it that you last saw Mrs. Blauvelt alive?

A. I think it was on Monday, the 24th.

Q. What month?

A. July.

Q. Will you tell me again what time of day it was?

A. Well, I could not say because I did not look at the clock, but it was in the afternoon between 2 and 3:30, somewhere along there; probably it was 3.

Q. Between 2 and 3:30?

A. I could not tell you the time exactly.

Q. Just where was it that you saw her?

A. In the lobby of the Pandora Apartments.

[fol. 499] Q. In the lobby?

A. Yes, and later on I saw her in front of the elevator just a few feet away talking to my mother.

Q. It was between 2 and 3:30 that you saw her in the lobby of the apartment?

A. Yes, I think it was nearer 3:30 because mother was putting away her laundry, a few linens in the closet, and the laundryman comes in the afternoon around 3 o'clock.

Q. Were you in the lobby at that time?

A. I was there at the time but I did not notice what time it was.

Q. Then it is not true, is it, that you were in your own apartment from 1:30 until 4 o'clock?

A. Well, my apartment is right off the lobby. I was around in there in the front part of the building during that time.

Q. It is not true that you remained in the inside of your apartment from 1:30 to 4 o'clock?

A. No, not there, but I was not in the back part of the house during that time.

Q. I see. Was Mrs. Blauvelt coming into the building or going out?

A. She was coming home, coming to the building; she had been downtown.

Q. What time of the morning was it that you were in the back part of the building?

[fol. 500] A. Well, I could not say. Between probably 10:30 and about 1:30 or 2 o'clock; I didn't notice the time.

Q. About 10:30 to 11?

A. Yes. I had a late lunch that afternoon because I was busy.

Q. 10:30 until about what time?

A. Probably 1 or 1:30.

Q. You did not at any time see this defendant about the building?

A. No, I did not.

Q. Let me ask you: All your tenants in that building are white people, aren't they?

A. Yes, sir.

Q. You didn't see a colored man around there that day, did you?

A. No, I did not.

Q. After you saw Mrs. Blauvelt in the lobby where did you go from there?

A. I don't remember.

Q. I beg pardon?

A. I don't remember. I must have stayed in the front part of the house, probably my apartment; I don't remember.

Q. Might you have gone back to the back of the house?

A. No, I don't think I did.

Q. Did you go back to the back part of the house at all any more that day?

A. I don't remember. I don't think I did, because I was [fol. 501] through with my work in the back part.

Q. You are not sure?

A. I don't remember going out.

Q. When was it you saw your mother talking to Mrs. Blauvelt by the elevator?

A. On Monday.

Q. What time?

A. Well, it must have been between 2 and 3; I don't know exactly the time, but it was between 2 and 3 or 3:30.

Q. Was it right after you spoke to Mrs. Blauvelt in the lobby?

A. Yes, and I was with her when she talked to my mother a few feet away.

Q. Your mother was doing something with the linens out in the hall?

A. Mother was taking care of that.

Q. What was it your mother was doing with the linens?

A. The laundry brings back the linens in the afternoon and there is a closet immediately across from the elevator, and she was counting them and putting them away.

Q. How long had your mother been out in the hall?

A. Oh, we were both out there most of the afternoon.

Q. Your mother was out in the hall most of the afternoon?

A. I mean the front part of the house.

Q. Now, you can see from the front part of the house down the hall to the back door, can you not?

[fol. 502] A. According to where you stand.

Q. Well, if you are standing by the elevator.

A. Yes, you can then.

Q. You could also hear the back door open?

A. No, the door was open and we could not hear a sound.

Q. It was standing wide open?

A. Yes, but there is a screen door.

Q. I see. There is a screen door?

A. There is a screen door and then the other door. (The screen door was closed but not latched, that is just closed, and the other door was open.

Q. From the lobby, the front part of the building, you can hear the screen door close, can't you?

A. No, sir.

Q. Doesn't that screen door slam after somebody opens it?

A. No, it has one of these—I forget what you call them—door checks.

Q. If somebody comes in through that screen door and walks along—withdraw that. How far is it from that screen door to the foot of the back steps?

A. Just a few feet; probably 10 or 15 feet.

Q. 10 or 15 feet?

A. Maybe not that far.

Q. Is that a carpeted hall?

A. Yes, fully carpeted.

[fol. 503] Q. If you are standing by the elevator and somebody comes in that screen door and walks across to the steps, can you hear them?

A. No, sir.

Q. You can see back to the screen door from the elevator, can't you?

A. Well, the hall is rather dark. You could see a shadow but you could not tell who it is, if someone should come in. But we are not there all the time.

Q. Was the hall dark in the afternoon?

A. Yes, quite dark on the first floor.

Q. How far is it from the lobby to the screen door in the back?

A. I wouldn't know. Probably 125 feet, or more.

Q. What?

A. Maybe 125 feet.

Q. 125 feet?

A. It is almost the length of the building.

Q. Is the elevator in the middle—

A. The front part.

Q. —in the middle or in the front part?

A. In the front.

Q. Now, how long did you say your mother had been out there?

A. I beg your pardon?

Q. How long had your mother been there arranging the [fol. 504] linens?

A. It wouldn't take ten minutes. We spoke to Mrs. Blauvelt; maybe she was there 20 or 25 minutes.

Q. You and your mother were in and out of your—strike that. You and your mother live in the same apartment?

A. Yes, sir.

Q. When you were in your apartment that afternoon between 1:30 and 4 o'clock, had your mother been in there all the time?

A. Yes. We had our lunch and we talked, and I laid down about 20 minutes, I think it was, and I went out and spoke to Mr. Heck; I met him in the lobby.

Q. Your mother watches for everybody that comes in and out of the building, doesn't she?

Mr. Roll: I object to that as calling for a conclusion.
The Court: Objection sustained.

A. Well, she is very—

The Court: Objection sustained. You do not have to answer that.

By Mr. Safier:

Q. Was the time that your mother was arranging the linens by the elevator the only time during the afternoon she was out in the hall?

Mr. Roll: I object to that—

A. The only time I remember of her being out there.

Q. The only time you remember of her being in the hall. Was your mother out talking with Mr. Heck, too?

[fol. 505] A. I don't remember if she was or not; she may have been; I don't remember that. I know I talked to him.

Q. Were you on the fourth floor at any time that afternoon?

A. I don't—I must have been—I always go through the house between 9:30 and 10 o'clock.

Q. No, in the afternoon.

A. I don't remember that.

Q. You don't recall whether you were or not?

A. No. I don't think I did, unless probably later in the evening. I left a note for Mrs. May, but that was rather late in the evening.

Q. Did you see anything of a strange woman around the building at any time?

A. No, sir.

Q. Had you heard anything about a strange woman being seen around the building?

Mr. Roll: I object to that on the ground it would be hearsay.

The Court: Sustained.

By Mr. Safier:

Q. Did any of the tenants report or say anything about a strange woman being seen around the building?

Mr. Roll: I object to that on the ground it would be hearsay.

The Court: Sustained.

[fol. 506] Mr. Safier: I think that is all.

Mr. Roll: That is all. May this lady be excused?

The Court: She may be excused.

(Witness excused.)

MRS. ISABEL TURNER, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name, please.

A. Mrs. Isabel Turner.

Direct examination.

By Mr. Roll:

Q. Mrs. Turner, where do you live, please?

A. 2441 Crenshaw Boulevard.

Q. Is there a Mr. Turner?

A. Not here.

Q. Directing your attention to your employment, where do you work?

A. Manager of the library in Bullock's.

Q. That is a lending library there in Bullock's?

A. Yes.

Q. How long have you been there at Bullock's?

A. It will be three years in January.

Q. Did you know a lady by the name of Stella Blauvelt?

A. Yes.

[fol. 507] Q. Was she one of your customers?

A. She was one of my customers.

Q. Directing your attention to the date of the 24th of July, 1944, did you see Mrs. Blauvelt on that day?

A. Yes. I have an independent recollection of seeing her, and I also have the book that she took out on that day, with the date.

Q. Do you have the book here with you?

A. Yes.

Q. You refer to a book known as "D-Day"?

A. That is right.

Q. About what time would you say you saw her?

A. About 11:30.

Q. About 11:30?

A. Yes.

Q. Now, on the inside of this book, there is a little compartment here and in the little compartment there is "Bullock's Book Club"—that is printed on there, and notice down under the date of the 24th of July there is written, in ink, "Blauvelt"—is that correct?

A. That is correct.

Q. Is that your writing?

A. That is my helper's writing. We were both standing there. She gave her the book.

Q. You say in addition to this date you have an independent recollection of her being in there; is that [fol. 508] correct?

A. Yes, I remember seeing her.

Q. Now, how long would you say you had been waiting on her when she came in there?

A. You mean at that time, on that date?

Q. No, no. I mean previous to that time.

A. She had been a member ever since I had been in the library. She was a member of the library before I took over.

Q. Now, with reference to this date of the 24th, what, if anything, can you tell the court and the members of the jury as far as Mrs. Blauvelt is concerned, as to whether or not she was wearing any rings?

A. She was wearing more than one.

Q. With reference to the rings—when you say more than one, how would you describe the rings?

A. Well, there was one, I know, was a big stone; we noticed these rings very particularly, the three of us. There was—there was another one that I cannot describe.

Q. When you say a big stone—

A. Yes, a big carat diamond.

Q. That was the last time you saw her alive?

A. Yes.

Q. About what time of day do you fix that, again?

A. Around 11:30.

Q. In the morning?

[fol. 509] A. Yes.

Mr. Roll: You may cross-examine.

Cross-examination.

By Mr. Safier:

Q. How many rings did you say Mrs. Blauvelt wore on that occasion?

A. Well, as I say, I haven't a recollection of more than two: Previous to that she always seemed to—we were always impressed with the idea of the number of rings on her hand. But I do remember seeing two on that day; I mean, I can recall that.

Q. When you say that you were impressed at times with the number of rings, do you mean to say on some occasions she was wearing more than two?

A. As I say, I don't want to swear to that now. But that is the idea that we have, that she always had rings on both hands.

Q. She had rings on both hands?

A. Yes. But, as I say, I couldn't swear to that on that day. That is the impression that we had; that is what we commented on at the time.

Q. Would you say whether she had rings on both hands on July 24th?

A. No.

Q. But you are certain she had those two rings on one hand?

[fol. 510] A. Yes.

Q. Referring to the two rings that you saw on the one hand, which hand was it?

A. Ring finger, left.

Q. Left hand?

A. Yes.

Q. You have indicated your left hand?

A. That is right.

Q. Were they both on the same finger?

A. Yes.

Q. Was one of them a wedding band?

A. No, I don't think so.

Q. You didn't see any wedding band?

A. No; I didn't see any wedding band. I have a recollection of a large carat and another ring, but not a wedding ring.

Q. How about a wrist watch?

A. That I couldn't say.

Q. You don't remember that?

A. No.

Q. It was about 11:30 that you saw her at the book department in Bullock's?

A. Yes, on the fourth floor.

Q. Was she alone?

A. Yes.

Q. Was she wearing a blue coat at the time?

[fol. 511] (Witness shakes head negatively.)

Q. You don't remember?

A. No.

Mr. Safier: That is all.

Redirect examination.

By Mr. Roll:

Q. The Bullock's that you are at is the one down at Seventh and Broadway?

A. Yes.

Mr. Roll: That is all. May the lady be excused?

The Court: She may be excused.

(Witness excused.)

Mr. Safier: Mrs. Massey is still in the courtroom. I neglected to ask her one or two questions, your Honor.

The Court: You may do so.

MRS. MARIE MASSEY, resumed the stand:

Cross-examination.

By Mr. Safier:

Q. Mrs. Massey, you knew Mrs. Blauvelt for how many years?

A. Almost three years.

Q. Almost there years?

A. Yes.

Q. Did she have any callers from time to time?

[fol. 512] A. Any what?

Q. Did she have any callers from time to time?

A. Very, very seldom.

Q. Very seldom?

A. Mostly women, or a husband and wife she had known for a long time, like Mr. and Mrs. Watts.

Q. Didn't she have any gentlemen callers?

A. No.

Q. You never saw any?

A. No, she never did have, I am sure of that.

Q. Have you ever seen any men go in her apartment and visit with her at all?

A. No, even with her business she would go downtown, to her banker or her lawyer. She never had anyone come to the apartment.

Q. She did have guests, however, from time to time?

A. Occasionally. She belonged to a foursome, and some guests in the apartment house would come to her apartment occasionally.

Q. Had you ever seen her go out with any gentlemen?

A. I never have.

Q. You never saw any men go into her apartment?

A. No; I am sure of that.

Mr. Safer: That is all.

Mr. Roll: That is all. May the lady be excused?

The Court: She may be excused.

[fol. 513] Mr. Roll: I was going to excuse this lady, but counsel indicated he wanted her mother back for some additional questions. In excusing her I was going to have her tell her mother to come in. Do you want her, Counsel?

Mr. Safer: No.

Mr. Roll: You may be excused.

(Witness excused.)

[fol. 514] WILLIAM H. BRENNAN, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: State your name.

A. William H. Brennan.

Direct examination.

By Mr. Roll:

Q. Your full name is William H. Brennan?

A. Correct.

Q. You are a police officer of the City of Los Angeles?

A. Yes, sir.

Q. Attached to the Wilshire Detective Bureau?

A. Yes, sir.

Q. On the Homicide Detail there; is that correct?

A. Yes.

Q. Were you working as such on the date of the 24th of July, 1944?

A. Yes, sir.

Q. Who was your partner?

A. Sergt. G. H. Wiseman.

Q. The gentleman seated here at my right?

A. That is correct.

Q. On the evening of that date did you receive a call to go to 744 South Catalina Street?

A. I did.

Q. About what time did you arrive there, Mr. Brennan?
[fol. 515] A. I arrived there approximately at 8:15 p. m.

Q. Did you go to apartment 410?

A. I went to apartment 410.

Q. Was Mr. Long already there, the officer who just testified here?

A. Yes; Mr. Long was already there.

Q. Do you recall whether any other officers were there or not?

A. Yes, there were two officers from downtown, officers McGary and Brown, I believe.

Q. Now, at the time you arrived there, with reference to the condition of the room, I show you People's Exhibit 8; is that a fair representation of what you observed in so far as the lady whom you later learned to be Mrs. Blauvelt, is concerned?

A. Yes, that is a fair representation.

Q. All right. Now, were you there when the coverings were taken off of the body?

A. I was.

Q. Were you also there when the pillows were taken off?

A. I was.

Q. Now, can you describe, sir, with reference to the pillows what you observed concerning the pillows and any substance on the pillows and where it was located?

A. Well, I noticed when I removed the large pillow, which is a pillow that appeared to have come off an over-[fol. 516] stuffed chair—it was a heavy cushion—I noticed on the bottom side of the cushion a spot of what I thought

was blood, which appeared to be blood to me and on the top of the pillow there was none. I removed the pillow, set it to one side, and I noticed then that on the top of the second cushion, which was a red cushion, there was no stains that I could observe from the naked eye. I removed the second cushion, uncovering the base of the body, and on the bottom of the red pillow I noticed another spot of blood, or what appeared to be blood, a brown substance.

Q. With reference to the blood that you observed there, what was its condition to whether it appeared to be wet or dry or sticky?

A. The blood on the large cushion was thoroughly dry, I say what appeared to be blood, and on the second—on the bottom cushion it also appeared to be quite dry.

Q. Now, People's Exhibit 33 I now show you here, showing the top portion of the body of Mrs. Blauvelt; is that the way it appeared in so far as the top portion is concerned after you did remove the pillows?

A. This is after the pillow and the coat was removed. There was a brown coat over the lower portion of the body.

Q. This photograph here, the view which is taken, People's Exhibit 33, only gives a portion of the left arm, it does not show the light cord which runs under there. I don't believe either, does it?

[fol. 517] A. No, it does not.

Q. Can you describe in your own language with reference to the appearance of the face and neck, what you observed after you got the pillows off?

A. When the pillows—when I removed the pillows I noticed just over the neck underneath the pillows was a brown mesh rag, very often used as a dish rag, and in removing the dish rag I noticed underneath that a cord wrapped around the neck three times and tied in a knot; the right arm was extended upward in this manner (indicating), with the palm up; the left hand was at right angles to the body in this manner (indicating).

Q. Now, with reference to the left hand—and I believe it is depicted here on People's Exhibit 8—I notice on the left hand there appears to be a wrist watch; did you observe that?

A. I observed the wrist watch, and I noticed the band—the band of the wrist watch was open; it had a black cloth band on it, and this band was open, or the catch on the

band was open, and I noticed the watch had stopped at 10 minutes past 2.

Mr. Safier: I did not hear the last part of that answer.

A. The wrist watch had stopped a little after 2; I believe it was 10 minutes after 2.

By Mr. Roll:

Q. Directing your attention to the left hand, what if [fol. 518] anything did you observe with regard to any rings on the left hand?

A. The left hand was closed with the palm up, and it had a wedding ring, yellow band wedding ring on the ring finger.

[fol. 519] Q. No diamonds whatsoever?

A. None whatever.

Q. This picture here, People's Exhibit No. 8, fairly depicts the left hand there, the watch and the one ring; is that correct?

A. Yes, that is just like it was when I arrived.

Q. Now, I notice on People's Exhibit No. 8 that there is some cloth of some kind or character over the body. What is that?

A. Well, that is a coat, a lady's tan or light brown coat.

Q. And that is the one which was thrown over the body here, you mean?

A. That is right.

Q. With reference to—

The Court: Let me clear that up. Was that coat over the body at the time your first saw it, Mr. Brennan?

A. Yes, it was over the lower portion of the body.

Mr. Roll: This is the one he refers to, the tan or brown coat (exhibiting photograph to the jurors).

Q. Then there is another coat that Mrs. Blauvelt had on; is that correct?

A. Yes, there was.

Q. And that is reflected here in the top portion of People's Exhibit 33?

A. Yes.

[fol. 520] Q. Do you remember the color of that coat?

A. It was a blue coat, a navy blue coat made of some kind of light material like rayon or silk; it was not really silk; it was more of a rayon coat.

Q. This is the one you refer to here?

A. Yes, sir.

Q. Now, with reference to the chair, People's Exhibit 11, does that photograph fairly depict what you saw when you arrived there?

A. Yes, that is exactly as it was when I arrived.

Q. I notice there is a purse there; is that correct?

A. That is correct.

Q. Now, was there a coin purse around there somewhere?

A. There was a coin purse open—sitting right in the opening of the large purse.

Q. Are the shoes depicted there?

A. The shoes are there as they were.

Q. I notice there is a package up there. Do you know what was inside of that package?

A. Two ears of corn.

Q. There is a small mark, just on the edge, down here; is that another package?

A. Yes, as I recall, there was one package that had an ear of corn—pardon me, there was one package with a can of some kind of corn or peas and another can that had something in it, a quarter pound of butter, and then there [fol. 521] was a small package, I don't recall it was some kind of fresh vegetables in it, string beans or something of that nature. I am not too clear on that, but it seems like there was a third package, a small package.

Q. Now, with reference to the light cord which you have described as some of it being around the neck of Mrs. Blauvelt, and a portion of it going to her body, when you got down to the other end of this light cord, not the end around the body, but the other end, was that actually attached to something, or had it been jerked loose from something?

A. No, it was attached to a stand lamp, and in examining the stand lamp I noticed that the top ball of the lamp was broken off.

Q. What do you mean by the top ball of the lamp?

A. Well, the shade on the top of the lamp, there is a ball which screws on the top, and the top of that was sort of some kind of ornament, and that had been broken off and it looked freshly broken.

Q. With reference to this lamp, it would be over in this location somewhere?

A. Yes, right near the door, the door leading into the hallway that goes to the kitchen.

Q. People's Exhibit 17, does that show at least the top portion and base of the lamp?

A. Yes, it does, right there it shows it.

[fol. 522] Mr. Roll: If I may indicate that to the jury? He is indicating the top portion and this is the base down here (exhibiting photograph to the jurors).

The Court: What number exhibit is that, Mr. Roll?

Mr. Roll: No. 17.

The Court: I think I will mark that in evidence.

Mr. Roll: I thought it was.

The Court: No. 16, 17, 19, and 20 are not in evidence. They are all marked in evidence.

Mr. Roll: This is the top portion of the lamp, and the base of the lamp and the cord (exhibiting photograph to the jurors).

Q. Now, Mr. Brennan, with reference to after the garment, the coat, the tan coat, was removed from the body there, we will now take the lower portion of the body of Mrs. Blauvelt, and I will ask you this first, with reference to shoes or stockings, did she have any shoes or stockings on?

A. She did not.

Q. With reference to her dress itself, what was the condition of her dress? Was it pulled down as far as her knees or was it pulled up or what?

A. It was up around her waist with her panties showing.

Q. With reference to what we might—could you indicate possibly by pointing on me, along my leg here, about how high the dress came, wherever it was?

[fol. 523] A. About right here, it was on a slant.

Q. Indicating on the left side, one side at least about the hip bone; is that correct?

A. Yes, and then down lower, about 4 inches, on the other side.

[fol. 524] Q. With reference to the undergarments that Mrs. Blauvelt had on, were those also pulled up?

A. The panties was torn at the crotch, that is the crotch was torn out and laid up over the top of the dress.

Mr. Roll: I have here a photograph, if the court please, that I ask be marked People's Exhibit next in order for identification.

The Court: That will be 34.

By Mr. Roll.

Q. I direct your attention to People's Exhibit 34: Does that fairly illustrate, Mr. Brennan, the torn condition of the pants that you have referred to in your testimony?

A. Yes, it does on the left side.

Q. If I understand you correctly in so far as the dress is concerned, the dress was as you have described in your testimony here to me a little lower; is that correct?

A. Yes, sir, I remember the dress was a little lower than that pictured. That dress was pulled up slightly to get a better picture of the panties that were torn.

Mr. Roll: I offer this in evidence, if the court please.

The Court: Marked 34 in evidence.

By Mr. Roll:

Q. About how long would you say you were around there, Mr. Brennan?

A. I should say about three hours.

Q. Were you there when the fingerprint man was there?

A. I was.

[fol. 525] Q. Did you make any search there of the premises then or later on for any rings?

A. We did.

Q. Did you make any search that night?

A. We did.

Q. Where did you search?

A. We searched through the writing desk, through the dressers, in her purse and in the clothes closet and where we found her jewelry boxes, we looked through the jewelry boxes and we found considerable jewelry, mostly what appeared to be costume jewelry to me, but found no rings of any kind.

Q. Now, did you either at that time or later on make a search for a key to the apartment?

A. We did.

Q. Did you find any key at any time?

A. We were unable to find any.

Q. Did you accompany the administrator and his wife over there, Mr. and Mrs. Watts?

A. Yes, we did.

Q. That was about the 31st of July?

A. Approximately, yes.

Q. Was there a search made at that time in their presence?

A. There was a search made at that time and they searched the apartment. Mrs. Watts did know the type [fol. 526] of rings and she was looking for the particular type. I may correct myself. I said rings of any kind. I mentioned there was some costume jewelry, cheap rings like green settings and so on, but no diamond rings is what I was referring to, no diamond or white stone rings about the place. At the time that Mr. and Mrs. Watts and their attorney was there we made another complete search of the apartment that took us approximately an hour and a half or two hours and we were unable to find any rings, that is any white stone rings or diamond rings.

Q. Did you find any key to the apartment?

A. No, not any.

Q. Now, at the time you arrived there, Mr. Brennan, that particular evening on the 24th, was it dark or light at that time, as you remember?

A. It was dark.

Q. I take it the lights were on in the apartment; is that true?

A. The lights were on in the apartment.

Mr. Roll: Would this be a convenient place to take our recess, your Honor?

The Court: We will take a recess at this time. The jury will keep in mind the admonition heretofore given not to talk about the case or form or express any opinion until it is finally submitted. Recess until 1:45.

(Whereupon a recess was taken until 1:45 o'clock p. m. of the same day, Monday, November 20, 1944.)

[fol. 527] Monday, November 20, 1944; 1:45 o'clock P. M.

The Court: Let the record show the jury, counsel and defendant present. You may proceed. Mr. Brennan was on the stand.

WILLIAM H. BRENNAN, recalled:

Direct examination (resumed).

By Mr. Roll:

Q. Now, Mr. Brennan, with reference to the body of Mrs. Blauvelt lying there on the floor after the object which you described as having the appearance of a dishrag was removed from the neck, did you see a portion of a strand of beads?

A. Yes, I did.

Q. In addition to the portion of the strand of beads that were around the neck, were there any other loose beads there on the floor?

A. Yes, the strand of beads that was around the neck had been broken and there was quite a number of the beads scattered about the floor.

Q. Were you there when the body was actually moved?

A. I was not.

The Court: By the way, I do not think that Exhibit 7 ever was identified. I do not think Exhibit 7 was particularly identified at any one time. It was referred to, that is the beads marked Exhibit 7, but they have not been particularly [fol. 528] identified by anyone.

Mr. Roll: That is correct, and also the light cord.

The Court: That is No. 5.

By Mr. Roll:

Q. I am going to show you here a light cord, Mr. Brennan, which Dr. Webb brought in. Is that the light cord in this case?

A. Well, I did not mark the light cord at the time, but it is a light cord similar and identical with the one that was around the neck.

Q. Well, do you know this, Mr. Brennan, whether the light cord that was found there was brought into the preliminary examination and introduced in evidence there?

A. I believe it was, but I don't know.

The Court: I see. All right.

By Mr. Roll:

Q. I will show you here a strand of beads which have been marked People's Exhibit 7 for identification. Does

that give the appearance of the beads or a portion of them around the neck of Mrs. Blauvelt?

A. Those here look exactly like the beads that were around her neck.

Mr. Roll: I now offer the beads in evidence, if the court please, and also—

The Court: 7 in evidence.

Mr. Roll: And also the light cord.

The Court: 5 in evidence.

By Mr. Roll:

Q. Now, with reference to the purse or pocketbook, [fol. 529] Mr. Brennan, did you see the pocketbook there in the position which is shown in the photograph here?

A. Yes, I did.

Q. What, if anything, did you notice with reference to the pocketbook or purse?

A. I noticed that the pocketbook was opened, that is, the large pocketbook was opened and it had a small coin purse right at the entrance of it and it was opened and appeared to be empty. The articles from the pocketbook were strewn on the chair. In addition there was a handkerchief with some blood on it on the chair, or what appeared to be blood.

Q. Now, one other thing with reference to this dishcloth or dishrag which you have testified was on the face of Mrs. Blauvelt, down around the neck as shown here in the photograph, at any rate, did you look at that to see whether or not that had the appearance of having or not having any blood on it?

A. Yes, I examined it very closely and there was no indication that there was any substance on it that appeared to be blood.

Q. Now, Mr. Brennan, directing your attention to the defendant, do you know on what day the defendant was arrested?

A. The defendant was arrested on August 24, 1944.

Q. Did you see him shortly after he was arrested?

[fol. 530] A. I saw him within an hour after he was arrested.

Q. Where did you first see the defendant on that occasion?

A. I first saw the defendant at the University Police Station.

Q. About what time?

A. Approximately 3 a. m.

Q. On what charge was he booked at that time?

A. He was booked on suspicion of murder.

Q. Was there any conversation you had with the defendant at that time concerning his booking slip?

A. Yes, there was.

Q. Go ahead and relate it.

A. When the defendant was booked the desk sergeant asked, "What is the charge?" and the booking—the man who booked him, Officer Towns, said, "Suspicion of murder." The defendant says, "Oh, not me." They went ahead and booked the defendant and the defendant was searched; after the defendant was searched the slip—booking slips were torn out of the machine and one copy of the booking slip was handed to the defendant on the desk and he pushed it away and he says, "Oh, no, you aren't going to put no murder on me," and he threw the booking slip on the floor.

Q. Now, Mr. Brennan, I am going to ask you concerning some conversations, and in relating those conversations would you give just the facts as they pertain to this case? [fol. 531] Is that clear, Sir?

A. Yes.

Q. Directing your attention to later on, on the 24th, at the Wilshire station, or it may have been University, did you have some conversation with him?

A. We had no further conversation at the Wilshire police station, but on the way—well, just before we left—at the Wilshire police station he was asked—not the Wilshire but University police station; Sgt. Wiseman asked the defendant what his address was, and he said 911 North Beverly Drive, Beverly Hills. Then we went out and got in the police car and took the defendant back to the Wilshire division for rebooking into the Wilshire station, and at that time Sgt. Wiseman asked him what his address [fol. 532] was again, on the way over, and he stated that he lived at 855 East 28th Street, I believe was the address.

Q. Go ahead.

A. That was about all the conversation that we had pertaining to this case with him on that evening, or that morning, before booking him and turning him over to the jailer at Wilshire.

Q. Now, directing your attention to the daytime—you said you saw him around 3 a. m., the daytime of that same day, did you have occasion to have the defendant in an automobile in the vicinity of the apartment house here located at 744 South Catalina?

A. Yes, we did.

Q. On what street were you in a car with the defendant?

A. At that time we put the defendant into a car from the Wilshire Station and we drove to several locations on the west side, pertaining to other matters, but at one time we drove to Eighth and Catalina.

Q. All right. What happened when you got at Eighth and Catalina?

A. At Eighth and Catalina I stated to the defendant, I said, "Have you ever been on this street? Are you acquainted on this street?" He said, "What street is this?" I said, "This is Eighth and Catalina." I said, "I am speaking about the apartment house at 744 South Catalina. Was you ever at that apartment house?" He said, "I [fol. 53:3] wasn't." Sergt. Wiseman further asked him if he had ever worked there as a janitor or had any acquaintance there, and he said he had not, that he had never been on that street, nor had he ever been on Catalina Street. I further asked him if—if on his way—if he lived on the east side, I said, "If on your way to Beverly Hills to work, didn't you have occasion to cross Catalina Street?" "Well", he said, "I might have crossed it but," he said, "if I did, I don't know."

Q. All right. Now, after that occasion when was the next conversation you had with the defendant?

A. The next conversation we had with him was in front of 855 East 28th Street, where he had told us—previously answered that he had lived. While there in the car at that place, Sergt. Wiseman had stepped out of the car and had went up to the door to speak to the people who lived there, who we later learned were his wife, and at that time, why, he told me that he had had a death at his—a half-brother or his step-brother—I have forgotten which—had died;

and I asked him where he was buried from, and he said he was buried from the Peoples' Funeral Parlors. I asked him what his name was, and he said his name was Nissy Ross. That was about the extent of the conversation we had at that time.

Q. All right, go ahead.

A. We then had other conversations pertaining to other [fol. 534] matters. On the way back—we went back to the Wilshire Police Station—

Q. All right, go ahead. We took the defendant upstairs into the Wilshire Police Station, and at that time Sergt. Wiseman and myself and the defendant was present in—there was a couple of other officers around; I don't recall their names at this time—at that time the defendant was asked again if he didn't have another address that he was living at the present time, and he said that he didn't have any other address. But just before we took him upstairs, if I may retrace my steps—just before we took him upstairs he stated before we got out of the car, "well," he said, "I made one mistake. I told you my brother—my step brother's name," and he said, "You will go to the funeral parlors and find out all about my relations, anyway, so I might just as well tell you the fact." But he didn't tell us where he lived—

Mr. Safer: I did not hear that.

By Mr. Roll:

Q. Talk a little louder.

A. He didn't tell us where he lived nor did he tell us where his relations lived. Then we went upstairs into the detective bureau, and at that time I asked the defendant if he was ready to tell us the whole story and he said, "I haven't got anything to say," so I then told him that in the apartment at 744 South Catalina that we had found fingerprints in the apartment that corresponded with his, [fol. 535] and that they were his fingerprints and he must [fol. 536] have put them there if they were his prints. "Well," he said, "I never was in that apartment, and they are not my prints, and if they correspond to my prints somebody else put them there, because I was not in that apartment." I said to him, I said, "Well, you must have been in the apartment because there isn't anyone else could put your

prints in there but yourself and" I said, "they are definitely your prints." He said, "No, they are not my prints because," he said, "if they look like mine," he said, "somebody else put them there." I then went over and got the door, I think it is People's Exhibit 6—

Q. 6, the one here in evidence.

A. People's 6 in evidence, and I took the door out of my locker and I took the door and I sat it down in front of him, and I pointed out the prints to him on the door, and I said, "Those are your prints," and he said, "No, they are not my prints at all." I set the door down, and at this time Sgt. Wiseman showed the defendant the picture—I know it is in evidence but I don't know what number it is, it is a picture of the kitchen showing the garbage disposal door.

Q. I presume it was a smaller size than the one introduced in evidence here.

A. It is a small picture; not the enlarged picture, but a small one.

Q. A smaller size of People's Exhibit No. 18, is that correct, this one here?

A. That is correct. This picture here, Sgt. Wiseman showed this picture to the defendant and pointed out this garbage disposal door here, and he said, "That is how you got into that apartment, you went through the garbage disposal door, that is how you got into the apartment to burglarize it." He said, "Well, that is not so, I was not in the apartment." The defendant said, "Well, when was this murder, anyway?" "Well," I said, "you should know that better than anybody else;" I said, "you was present." He said, "I was not," that was his answer. Sgt. Wiseman then showed him the pictures—I don't know the numbers of them—

Q. When you refer to them, I take it you mean a smaller size?

A. A smaller size but this is the enlargement here. He showed him this picture here.

Q. That is Exhibit No. 33?

A. He laid the picture down in front of the defendant, that is this picture here, and he says, "Have you ever seen this party before?" and he wouldn't look at it, he pushed the picture away and it fell on the floor. Sgt. Wiseman then threw the rest of these pictures all in a bunch down in front of the defendant and told the defendant to go ahead and

look at it. The defendant refused to look at them and I said, [fol. 538] "What's the matter, can't you stand it?" He said, "I don't like to look at dead people." That was his answer to it. I believe that is about all the conversation we had at that time.

Q. You started to say he asked something about what date it happened on. Did you tell him when it happened?

A. Yes, Sgt. Wiseman said, after I had said to him, "Well, you should know," Sgt. Wiseman then spoke up and he said, "Well, as far as we can figure it out, it happened on July 24th some time in the afternoon." The defendant says, "Well, what day was that?" Sgt. Wiseman said, "That is on a Monday." "Well," he said, "I don't have to worry about Monday," he said, "because I will have my witnesses," he says, "and I can account for my Mondays," he says, "all summer, I know where I was, and when the times comes I will have my witnesses there to prove it."

Q. I did not hear the last part.

A. He says, "When the times comes I will have my witnesses there to prove it, and I will be defended by one of the best attorneys in Los Angeles."

Q. Now, with reference to the defendant, when was the next time you had some conversation with him as far as pertains to the facts in this case?

A. The next conversation that we had with the defendant was on the morning of the 28th of August.

Q. Let me ask you this before we get into that one: Did you yourself see him on the date of the 27th, the Sunday? [fol. 539] A: I did.

Q. At the station?

A. At the Central police station.

Q. Had you previously been to a room on South St. Andrews?

A. I had.

Q. What address was that?

A. 2460 South St. Andrews, on the third floor.

Q. And in that room, among other things, did you find a fountain pen?

A. I did.

Q. And when you saw the defendant on the morning of the 27th did you have the fountain pen with you?

A. I did.

Q. And did you exhibit that to the defendant?

A. I exhibited that pen in addition to another pen that was found in his room, a green colored pen.

Q. And was there anything said by him at that time in words or substance concerning where he lived?

A. Yes.

Q. All right, what was said as to where he lived?

A. When I first went in to the defendant I said, "Dewey, are you willing to tell me where you live now, where your room is at?" and at that time I had the pen in my hand like this, both pens in my hand like this. However, I never said anything about pens, I just held it in my hand. The defend- [fol. 540] ant looked down at the pens and he said, "Well, it looks like you already know where I live," and I said, "Yes, that is true, Dewey," I said, "we do know where you live; you live at 2460 South St. Andrews," and there was some other conversation but it does not pertain to this case. [fol. 541] Q. On this day before that you had gone to this room?

A. Yes, on a Saturday before.

Q. Were you taken there by either Mr. or Mrs. Reyes?

A. Mrs. Reyes.

Q. That is the landlady there, is that correct?

A. That is the landlady of the apartment.

Q. When you were taken there did she point out a room to you as being the room of the defendant?

A. Yes, she took us to the room and let us in.

Mr. Roll: I have here, if the court please, an envelope which contains a portion of three stockings which I ask be marked People's Exhibit next in order for identification.

The Court: 35.

By Mr. Roll:

Q. Directing your attention to the People's Exhibit 35 for identification, Mr. Brennan, I will ask you to examine that and state when and where you first saw those stockings?

A. It was on Saturday evening which would be August 26th, I believe. Sergt. Wiseman found this stocking on top of the dresser in the room at 2460 South St. Andrews. I saw him when he picked it up and he handed it to me to look at it.

Q. I am not very good on colors.

A. It is a lighter color.

Q. All right, the lighter color. Go ahead.

A. These are the two I found in the dresser drawer, in [fol. 542] the bottom dresser drawer with some other things, some stockings and socks that were in there.

Q. Now, with reference to the condition of these stockings, I notice each of the stockings has at the end which is away from what we might call the top a knot or knots tied in the end of each stocking. Was that the way they were found up there in the room of the defendant on the day of the 26th of August, 1944?

A. Yes, that is exactly the way they were when we found them.

Mr. Roll: Now, I will now offer in evidence these stockings, if the court please, Exhibit No. 35.

The Court: 35?

Mr. Safier: I object to them as incompetent, irrelevant and immaterial, having no bearing on the issues in this case.

The Court: Marked 35 in evidence.

By Mr. Roll:

Q. Now, Mr. Brennan, directing your attention, I believe you stated the 28th is when you had the next conversation?

A. Yes, on the 28th of August.

Q. All right, go ahead.

A. At that time we picked the defendant up at the Central Police Station—no, we got the defendant at the County Jail upstairs that morning on the 28th. We took the defendant to Division 4 for preliminary hearing.

Q. Now, I believe the preliminary hearing—that was the [fol. 543] date of the arraignment, wasn't it?

A. Yes, that is right, it was on the 28th, that would be the date of the arraignment, correction, that is right on the 28th, the date of the arraignment which was down on the 28th.

Q. The preliminary hearing, I believe, was held on the 1st of September?

A. On the 1st of September.

Q. Did you have some conversation with him on the date of the 28th?

A. We got him that morning, picked him up at the Central Police Station and brought him to Division 4. After he was arraigned in Division 4 on the way back to the elevators to take him upstairs to book him into the County, the defend-

and stated,—I said, "Well," I said, "Dewey, you have to go stand trial for this, anyway" and he said, "Well, that is all right." He said, "I will have my attorney and all my alibi witnesses there when the time comes." That is about the substance of the conversation.

Mr. Roll: Will you read that answer, Mr. Reporter?

(Answer read.)

By Mr. Roll:

Q. Have you had any later conversation with the defendant pertaining to the facts in this case other than that?

A. We had another conversation with him—we had the conversation with the defendant, I called at the County Jail [fol. 544] on the 31st of August. At that time we passed greetings in the County Jail, and the defendant, before we had a chance to ask him any questions, I asked him about something not pertaining to this case, and then the defendant spoke up and he said, "Well, you fellows are just wasting your time talking to me." He said, "You have your witnesses up there at the time and I will have my witnesses and my attorney and," he said, "you are just wasting your time talking to me so," he said, "you might just as well leave" so we left.

Mr. Roll: Cross examine.

Cross-examination.

By Mr. Safier:

Q. Mr. Brennan, you testified that you had some conversation at the Wilshire Police Station at which time you had these pictures present. When was that?

A. That was on the morning of the 24th—I should say, the afternoon of the 24th. I don't know the exact time but it was around 2 or 3—between 2 and 3 in the afternoon.

Q. The 24th of what? August?

A. The 24th of August.

Q. Who all were present at the time of that conversation?

A. Sergt. Wiseman, the defendant, myself, and there was another officer or two; I don't recall their names; it seems as I recall now it was Sergt. Powers and Sergt. Swan. [fol. 545] I wouldn't swear as to those officers. There was

a couple of other officers standing there present; it was in the squad room.

Q. Was this conversation in a little, small room?

A. No, it was in a big room, practically as big as this courtroom.

Q. How far away from the defendant were you when you talked with him?

A. Just across the table.

Q. Did you show him the pictures at that time?

A. Sergt. Wiseman laid the pictures down at that time and told him to look at them.

[fol. 546] Q. He told you he didn't like to look at dead people?

A. Yes.

Q. You had this garbage disposal door at that time too?

A. That is right.

Q. You showed him that at the time?

A. I did.

Q. As a matter of fact, at that time was there not a whole palm impression somewhere on that door?

A. I don't recall of any palm impression. There was a lot of fingerprint powder on it. I didn't pay any particular attention to a palm print or anything like that.

Q. Do you remember anything about an entire hand impression being on the door?

A. No, I don't recall seeing that on there.

Q. Now, what did you say to him when you showed him the door?

A. I pointed out the prints, and I said, "You see those prints on the door?" and he said, "Yes." I said, "Those are your prints." I said, "The only way they could get there," I said, "is you put them there."

Q. Did he pick the door up and look at the prints, at that time?

A. I did not get the question.

Q. I say, did the defendant pick the door up and look at it at that time?

A. No, he did not.

[fol. 547] Q. Did he look at the door?

A. He looked at it.

Q. How far away from the defendant was the door at that time?

A. About 2 feet.

Q. About 2 feet?

A. Yes.

Q. How long was the door within 2 feet of the defendant?

A. I don't know; maybe a minute or two.

Q. As a matter of fact, he picked it up and looked at it, didn't he?

A. No, I don't recall. He looked at it; I don't recall him touching it, no.

Q. Are you able to testify that he did not touch the door?

A. Yes, I will testify that he did not touch the door.

Q. I see. Did you have your hands on it all the time?

A. I did.

Q. You did not let it go out of your hands?

A. I didn't allow him to touch the door at all.

Q. I say, was the door out of your hands at any time during that conversation?

A. I set the door up on the table like this and had my hand on the top of it, and just pointed out the prints on the door to him.

Q. You are certain the defendant did not pick the door [fol. 548] up and look at it?

A. I am positive.

Q. Was there anything between the defendant and the door at that time?

A. Nothing at all.

Q. Several other officers were walking around there, weren't they?

A. There was.

Q. Or standing around the door?

A. No, they weren't standing around the door, but they were within hearing distance; you might say, spectators.

Q. Is that the first time you showed the defendant the door?

A. It was.

Q. Did you show it to him on any other occasion?

A. No, I don't recall showing it to him.

Q. You had the door at the preliminary hearing in this case?

A. It was, yes.

Q. It was?

A. Yes.

Q. You had it in the courtroom downstairs?

A. Yes.

Q. The defendant was present at that time, wasn't he?

A. Yes.

Q. Now, at the time of the preliminary examination in [fol. 549] this case how far was the door from the defendant?

A. Oh, I don't know; I couldn't say how far it was. It was on the table. I wouldn't even estimate how close it was to him.

Q. The defendant might have touched it at that time, might he not?

A. No, he did not.

Q. Was it out of your possession at that time?

A. No.

Q. You testified at the preliminary hearing, did you not?

A. I did.

Q. Did you have the door with you on the witness stand?

A. No, but it was in the possession of my partner when I didn't have it.

Q. You didn't—

A. It was not out of my sight, no.

Q. But the defendant was sitting at the same table with his counsel, wasn't he?

A. Yes, he was.

Q. The door was on the counsel table?

A. No, it wasn't.

Q. Where was it?

A. Leaning against the end of the counsel table.

Q. Leaning against the end of the table?

A. As I remember, it was leaning against the end of the counsel table.

[fol. 550] Q. At the same table at which the defendant and his counsel were sitting?

A. Yes, but the other end.

Q. Now, you have talked to a number of the neighbors at this apartment house at 744 South Catalina Street—strike that. You have talked to the tenants or a great number of them that live in that building at 744 South Catalina Street?

A. Yes, I think I talked to pretty near all of them.

Q. They are all white people, aren't they?

A. Yes, they are.

Q. There wasn't any of them that told you that they saw this defendant or any other colored man—

Mr. Roll: I object to that as being hearsay.
The Court: Sustained.

By Mr. Safier:

Q. You did get a report, did you not, that a strange woman had been seen around the building?

Mr. Roll: I object to that on the ground it is hearsay.
The Court: Sustained on that ground. If there is any such report, the report itself would have to be brought in.

By Mr. Safier:

Q. Well, in your investigation, Mr. Brennan, did you discover any evidence that a strange woman had been seen around the building?

Mr. Roll: Just a moment.

The Court: Just a minute. Sustained on the ground it calls for a conclusion and also calls for hearsay. In other [fol. 551] words, if anybody saw a strange woman around there, the person to testify to it is the person who saw her.

Mr. Safier: The difficulty is, your Honor, we do not know which of the tenants it was that made the report.

The Court: We do not know there was anybody. The jury is instructed at this time not to draw any inference from the statement of counsel that there was such a person.

Mr. Roll: I assign that as misconduct.

The Court: The very fact you do not know of any person who made the statement indicates there was not any such statement.

By Mr. Safier:

Q. What time did you get to the apartment that evening?

A. About 8:15 p. m.

Q. Was Mr. Wiseman with you?

A. I met Sgt. Wiseman as I entered the lobby, and we went up to the apartment together.

Q. You and Mr. Wiseman entered the apartment together?

A. That is right.

Q. You and Mr. Wiseman were the first to arrive, or were some police officers present when you got there?

A. There were some police officers present when we arrived.

Q. Who was it that was present when you arrived?

A. As I recall, Sgt. McGarry and Sgt. Brown, of the Central Homicide Squad, was there, Sgt. Long, Sgt. [fol. 552] Woodhall, of the Wilshire Detective Bureau, were there; that is the only officers that was there, as I recall.

Q. Now, the door to the garbage compartment, was that unhinged from the compartment itself—

A. Yes, it was.

Q. —when you first saw it?

A. Yes, it was.

Q. Mr. Brennan, you testified in your search of the apartment you found some jewelry; what did you find?

A. There was in the dressing room off of the bathroom—there were several boxes of custom jewelry; just ordinary jewelry that you might buy in any dime store or department store; there was necklaces, pins, brooches, and there was quite a quantity of—there was eight or ten strings of beads, various kinds, pearls, glass beads, red beads, green beads and blue.

Q. You observed that Mrs. Blauvelt had a watch on at the time you found her?

A. I did.

Q. Did she have any ring on?

A. She had one ring on.

Q. That was a gold band, wasn't it?

A. That is right.

Q. What day was it that you found those stockings, Mr. Brennan?

A. On Saturday, August 26, 1944.

[fol. 553] Q. You had been in the defendant's room prior to that date, had you not?

A. I had not.

Q. Did you ever show the stockings to the defendant?

A. I don't believe so, no.

Q. You never showed him that?

A. No.

Q. Did you ever show him the lamp cord?

A. No.

Q. You showed him the pictures and you showed him the door; did you show him anything else?

A. Well, —

Mr. Roll: Do you mean in so far as it pertains to this case?

By Mr. Safier:

Q. That is right, in so far as it pertains to this case.

A. I believe that was all.

Q. The defendant at all times denied to you that he had committed this murder, did he not?

A. That is right.

Q. Do you know who unhinged the garbage disposal door from the garbage compartment?

Mr. Roll: Just a moment.

A. I don't know.

Mr. Safier: I will reframe that.

Q. Do you know whether any of the police officers [fol. 554] involved in this case unhinged the door from the garbage disposal compartment?

A. The only way I could answer that question would be that when I arrived Sgt. Long informed me that nothing had been disturbed in the apartment, that he had allowed no one to enter the apartment at all.

Mr. Shafier: I think that is all.

Redirect examination.

By Mr. Roll:

Q. One or two questions, Mr. Brennan, with reference to the place there where the garbage disposal door fit. Did you yourself after the photographer got through go out into the kitchen and look at the siding there where the hinges had been?

A. Yes; I did.

Q. On which side was it actually hinged?

A. The door—I took the door and sat it against here, and the hinges were on this side; that would be the right side of the door; the screws that fit in the holes on the side or wall—on the side of this board, were still in the hinge, and some of the loose wood that appeared to have come out of the holes was still adhered to the screws that was still in the hinge of the door. The hinges were on the outside of the door.

Q. This is the portion of the door on this side where the door was hinged; is that correct?

[fol. 555] A. That is correct.

Mr. Roll: He has indicated here is the casing the door was hinged onto, on this side over here (exhibiting photograph to the jury).

Q. Next to the wall, is that correct?

A. Next to the wall.

Q. Now, with reference to the time which you have testified to, that you had a conversation with the defendant concerning the prints on the door, I will ask if at that time the prints which have been testified to here were at that time covered with Scotch tape?

A. They were.

Q. And there at the time you picked the door up—you testified you picked the door up, I understand, after the fingerprint man got through?

A. Yes.

Q. At that time was the Scotch tape on the prints?

A. It was.

[fol. 556] Mr. Safier: Just a moment. I move to strike out the last two answers, if the court please, as being a conclusion and opinion of the witness.

The Court: It wouldn't be a conclusion. He certainly could see the pieces of Scotch tape.

Mr. Safier: He could see the Scotch tape, but he doesn't know whether it covered the same fingerprints we are talking about here.

The Court: I think he could tell that. I do not think there is any confusion about it. I think he could see with his own eyes. It would be direct testimony on his part and not a conclusion.

By Mr. Roll:

Q. In so far as this door is concerned, Mr. Brennan, the door was not introduced into evidence at the preliminary hearing?

A. I don't believe so. I wouldn't say for sure. I don't remember. But it didn't seem to me like it was.

Q. With reference to the piece of Scotch tape opposite the arrow "A" and the piece of Scotch tape opposite the arrow "B" and the piece of Scotch tape opposite the arrow "C", on the reverse side of the door, the metal side, were those pieces of Scotch tape on there when you picked the door up there in the apartment on the night of the 25th?

A. Yes. This piece of Scotch tape here (indicating), I saw Officer Ferguson take a picture and put that tape there myself.

[fol. 557] Q. You refer to exhibit C?

A. "C." These other tapes he put on there when I was not present? But when I picked up the door these two pieces and the other one were still on the door.

Q. They were on there at all times since then?

A. To my knowledge, and the door has not been out of our possession.

Mr. Roll: Cross examine.

Recross examination.

By Mr. Safier:

Q. Officer Brennan, at the time the door was removed from the apartment, how many pieces of Scotch tape were on it?

A. Three, to my knowledge; there were three different places with Scotch tape.

Q. Three?

A. Yes, sir.

Q. How many pieces of Scotch tape were on there at the time you showed the door to the defendant over at the police station?

A. Three.

Q. I understand your testimony is that you had the door at the preliminary hearing and it was not introduced in evidence?

A. I am not sure. I would not want to swear either way to that; I don't know.

[fol. 558] Q. But you do know that you had it there?

A. We had it but I don't remember whether it was introduced into evidence or not.

Q. Did you have stockings there at that time, too?

A. I believe we did.

Q. You are not certain?

A. I am not certain, no. I do not think we did have the stockings there—no, I am quite sure we did not.

Q. You are sure now that you did not have the stockings?

A. I don't think we did, no.

Q. And you never at any time told the defendant about the stockings?

A. No, I don't believe we ever mentioned the stockings to the defendant.

Mr. Safier: I think that is all.

Mr. Roll: That is all. Take the stand, please.

[fol. 559] G. H. WISEMAN, called as a witness on behalf of the People, was duly sworn and testified as follows:

The Clerk: What is the name, please?

A. G. H. Wiseman.

Direct examination.

By Mr. Roll:

Q. With reference, Mr. Wiseman, to the door which has been marked here as People's Exhibit 6 in evidence, were you present at the time there was some discussion with the defendant concerning the door over in the Wilshire Station?

A. I was.

Q. And did the defendant touch that door at any time?

A. No, he did not.

Q. With reference to the door itself either on the 24th or 25th of August, whatever day it was there, was the Scotch tape already on the door?

A. Yes, it was.

Q. Now, at the preliminary hearing was the door introduced into evidence or not?

A. It was not introduced into evidence.

Q. Was it taken back to Wilshire Station?

A. That is right.

Q. And kept in a locker?

A. That is right.

Q. And brought down here for the trial in Superior Court?

[fol. 560] A. That is correct.

Mr. Roll: Cross examine.

Cross-examination.

By Mr. Safier:

Q. At the incident in the Wilshire Police Station you had the door present and the defendant was present and who else was present?

A. Sergt. Brennan was holding the door and I was standing alongside of the defendant and the defendant was seated at a table and there were two other officers present in the room, and I believe that was Sergts. Powers and Swan.

Q. How far away from the defendant was the door?

A. I would say about 2 feet.

Q. For how long a period of time?

A. Oh, just a few minutes. I would say a couple of minutes.

Q. You were not holding onto the door all that time, then, were you?

A. No; Sergt. Brennan had hold of it.

Q. You did not have hold of it?

A. No, sir.

Q. You were by the defendant?

A. That is right.

Q. The defendant might have touched the door at that time, might he not?

A. No, I am quite sure he did not.

[fol. 561] Q. You are quite sure he did not? And you had the door at the preliminary hearing?

A. We did.

Q. And you had it at the same counsel table at which the defendant and his counsel were seated, didn't you?

A. We had it up at the other end from where the defendant was seated.

Q. Well, the room where you held this preliminary examination, so far as the counsel table, the bench and everything is very similar to this one, is it not?

A. That is right.

Q. When you said you had it at the other end where the defendant was seated you mean you had it at the end of the counsel table where Mr. Roll is seated?

A. That is correct.

Q. Did you have it on the table?

A. As I remember it was leaning up against the end of the table on the floor.

Q. Standing on the floor?

A. That is right.

Q. Did the defendant come by that way when he came in?

A. No, I don't believe so.

[fol. 562] Q. Which way did the defendant come into the courtroom?

A. Well, he passed that way from the prisoners' box.

Q. He did pass that way?

A. He passed that way, yes, sir.

Q. Immediately next to the end of the table the prosecuting attorney was seated, wasn't he?

A. That is right.

Q. Were you seated next to the prosecuting attorney?

A. I was.

Q. Was some other police officer seated there, too?

A. Sgt. Brennan was sitting in a chair directly in back of me.

Q. Directly in back of you. That door was in your possession during the entire preliminary examination?

A. As well as I can recall.

Q. The defendant also walked past there when he left, didn't he?

A. I believe he returned to the prisoners' box after the preliminary hearing was completed.

Q. I see, going around where the door was?

A. Yes.

Mr. Safier: That is all.

Redirect examination.

By Mr. Roll:

Q. The defendant was represented at the preliminary hearing by Mr. Ward Sullivan out of Mr. Giesler's office, wasn't he?

[fol. 563] A. That is correct.

Mr. Roll: No further questions.

Mr. Safier: That is all.

Mr. Roll: There are two exhibits here, if the court please, which Mr. Rogers brought into court, which are photographs of the drawings there on the board which I would at this time—I will ask to have marked People's exhibit next in order I believe it will be 36.

The Court: I wonder if it would not keep our record a little better if we substituted them for the blackboard drawing, substituted that for the blackboard drawing?

Mr. Roll: Yes, your Honor, that will be perfectly satisfactory.

The Court: Don't you think it would be better?

Mr. Safier: I think so.

The Court: Because the blackboard drawing is likely to get smudged and we cannot carry it up into the jury room and make it a portion of the record. I will have to catch that and see what the blackboard drawing was.

Mr. Roll: I do not think either one was marked, your Honor.

The Court: Well, this photograph, then, ten figures on the blackboard drawing, using the large demonstration of the fingerprints which was on a separate blackboard and — which a part of the fingerprint is reproduced in chalk on the blackboard and has numbers running from 1 to 10, mark [fol. 564] that 36 in evidence. Then the photograph on the other blackboard which has been used by several witnesses, both Mr. Larbaig and Mr. Rogers, will be marked 37 in evidence.

The Clerk: What was 35?

The Court: The stockings were 35. We have a few other exhibits, while we are talking about exhibits, that are not in evidence. I will catch those in a minute for you. 31 and 32, which are photographic enlargements made by Mr. Rogers.

Mr. Roll: I will now offer those into evidence.

The Court: They will be marked in evidence. 28, 29 and 30—28 and 29 were enlargements which Mr. Larbaig produced.

Mr. Roll: I will offer those in evidence.

The Court: 30 was a fingerprint card which Mr. Rogers wrote. All marked in evidence.

Mr. Roll: That is the People's case, your Honor.

The Court: I think we will take our recess a little early before we go into the question of defense. The jury will keep in mind not to talk about the case, or form or express any opinion. Take our recess. That puts all exhibits thus far marked with any numbers at all, all are in evidence.

(The jurors left the courtroom and the following proceedings were had in their absence:)

Mr. ~~Safer~~: I want to make a motion at the bench.

[fol. 565]

MOTION TO STRIKE

(The following proceedings were had at the bench:)

Mr. Safer: I make a motion to strike from the evidence the handkerchief and the two napkins that were found in the search of the apartment on the grounds they are incompetent, irrelevant, immaterial, and have not been connected up in any way.

The Court: Well, with the exception of one handkerchief, they were all directly connected with the scene of the alleged offense. As to those, the motion will be denied. Now, there was an orange—a handkerchief which you referred to in Mr. Pinker's testimony, which was on the large overstuffed chair by the purse, No. 14, and that is found directly on the scene of the crime. Exhibit 15, the orange-colored handkerchief, was found in the dresser and bore the same name, "Carrie," as the handkerchief which was found on the chair. As to that the motion is denied. I think that is admissible as tending to show possession and ownership in the same individual of two separate handkerchiefs, in other words, it has some tendency—it may not be a great deal, but it has some tendency to show the handkerchief found by the purse was owned by the same person who owned the handkerchief found in Mrs. Blauvelt's dresser drawer. The napkin is 16, and that was found right on the scene of the offense.

MOTION FOR ADVISED VERDICT

Mr. Safier. The next motion will be made for an advised verdict on the ground the evidence is not sufficient to go [fol. 566] to the jury.

The Court: That motion will be denied on two grounds: One is, I think the evidence is sufficient to go to the jury, and the other is I never instruct the jury until both sides rest.

(Short recess.)

The Court: The record will show the jury, counsel and the defendant present. You may proceed.

Mr. Safier: May we have just one moment, your Honor?

The Court: Yes.

(Conference between defendant and his counsel.)

Mr. Safier: The defendant rests.

The Court: You may proceed with the argument.

Mr. Safier: May we approach the bench first, your Honor?

The Court: Yes.

(The following proceedings were had out of the hearing of the jury:)

RENEWAL OF MOTION FOR ADVISED VERDICT

Mr. Safier: The defendant at this time renews his motion for an advised or directed verdict on the ground of the insufficiency of the evidence.

The Court: Motion denied.

Mr. Safier: Very well.

(The following proceedings were had in open court:)

The Court: You may proceed with the argument.

(Argument.)

[fol. 567] (After argument to the jury by respective counsel, and the instruction of the court having been read, the jury at 3:30 p. m., November 24, 1944, retired to deliberate upon its verdict.)

Wednesday, November 22, 1944; 2:35 o'clock P. M.

The Court: The record in the case of People vs. Admiral Dewey Adamson, No. 98734, will show the defendant present, counsel present and the jury present. Have you agreed upon a verdict, Mrs. Dickie?

The Forewoman: We have, your Honor.

The Court: You may hand it to the bailiff.

(Verdicts handed to the court by the bailiff.)

The Court: The clerk may read the verdicts returned by the jury.

(Verdicts of jury read by the clerk.)

Mr. Safier: I ask the jury be polled.

The Court: The clerk may poll the jury. Possibly this next procedure may be somewhat new to some of the jurors. You have already been asked whether this is your verdict, your individual verdicts, and the verdict of the jury. There is a procedure known as polling the jury. The clerk will call each of your names and ask if this is your verdict, and you will answer if it is or is not your verdict.

[fol. 568] (Jury polled by the clerk.)

The Court: You may record the verdicts.

The Clerk: They do not have to be recorded.

The Court: They still have to be recorded. This will conclude your services in this particular case, ladies and gentlemen.

(Jury thereupon retires from courtroom.)

Mr. Safier: At this time we give notice of a motion for a new trial.

The Court: What was that other date?

The Clerk: Friday, the 24th.

The Court: Do you want to put this on Friday with the other case, for the same time, and hear the two of them together?

Mr. Safier: It would suit me better to have it Monday.

The Court: Set this matter down for Monday, the 27th, for judgment and sentence.

Mr. Safier: And have the other one go to Monday too.

The Court: The motion for a new trial?

Mr. Safier: Both at the same time.

The Court: Yes. At the request of the defendant, this consolidated case, 98734 and 98859, is also continued, on motion of the defendant, until Monday, November 27th, at 9 o'clock a. m.

Mr. Roll: With reference to the other case, is it within the statutory time?

[fol. 569] The Court: When it is at the request of the defendant the statute does not operate.

[fol. 570] Monday, November 27, 1944; 9:00 o'clock A. M.

JUDGMENT AND SENTENCE

The Court: Admira! Dewey Adamson, you were heretofore arraigned under Information 98734, charging you with the crime of murder in count one and burglary in count two. The information also alleged that you *had* previously convicted of the crime of burglary in February, 1920, and the crime of first degree robbery in June, 1927, both convictions having been suffered in the State of Missouri, and both having punishment inflicted by the service of terms of imprisonment in the State Prison of that State. These prior convictions were admitted by you and were not submitted to the jury. The issues of fact being submitted to the jury on counts one and two, the jury returned a

verdict finding you guilty of the crime of burglary of the first degree, as charged in count two, and found you guilty of murder in the first degree under count two, without recommendation, the verdict carrying with it the death penalty. This is the time set for judgment and sentence, and any further proceedings on the motion for a new trial made on November 24, 1944.

Mr. Safier: On the motion for a new trial we urge the evidence is insufficient as to the murder count and as to the burglary count; that the only evidence in the case tending to connect this defendant at all was the fingerprint evidence, and that evidence did not directly connect him [fol. 571] with the crime of murder. The record is silent as to how long prior to this crime those fingerprints might have been placed there, and it is not a circumstance that directly connects this defendant with the crime of murder. I submit it without further argument.

The Court: Well, the motion for a new trial is denied. The record will show that the court is fully appreciative of the entire situation here and the seriousness to the defendant. The court has absolutely no doubt of the guilt of the defendant of both of these offenses. The record might also show this question has been already approved in our courts, *People v. Ramirez*, 113 Appellate, 210, the court specifically holding that the finding of the fingerprints of a defendant at the scene of a burglary was sufficient in law to connect the defendant with the offense and sustained the conviction. Is there any further legal cause why sentence should not now be pronounced?

Mr. Safier: None, your Honor.

The Court: Let the record show that this defendant is charged by information filed on September 14, 1944, with the crime of murder, in count one, and burglary in count two, and three other counts of burglary which were thereafter severed and joined with another information and tried separately. The information alleged two prior felony convictions, to-wit, the crime of burglary in the State of Missouri, for which, in February, 1920, the defendant was [fol. 572] sentenced to serve a term of imprisonment in the State Prison, and the crime of first degree robbery in the State of Missouri, for which, on or about the 30th day of June, 1927, the defendant was sentenced to serve a term of imprisonment in the State Prison. Originally the defendant denied these prior convictions, but prior to

trial admitted the prior convictions, and the information was submitted to the jury merely upon the pleas of not guilty of the defendant to the charges of murder in count one and burglary in count two.

The cause came on for trial on the 15th of November, 1944, and after hearing the evidence and the instructions of the court, the jury retired and returned verdicts on the 22nd of November, 1944, finding the defendant guilty under count one of the information of the crime of murder in the first degree, and making no recommendation in their verdict as to the matter of penalty. The jury also found the defendant guilty of burglary of the second degree under count two of the information. It further appeared, at the request of the defendant, further proceedings for passing on judgment and sentence were continued to and set for the 24th of November, 1944, at the hour of 9 a. m., at which time a motion for a new trial was made, and at the request of the defendant was continued for further proceedings to this, the 27th day of November, 1944. At that time the motion for a new trial was heard and argued and by the [fol. 573] court denied.

It is now the judgment and sentence of this court, for the crime of murder of the first degree, of which you, the said Admiral Dewey Adamson, have been convicted under count one of Information 98734, the verdict carrying with it the extreme penalty of the law, that you, the said Admiral Dewey Adamson, be delivered by the Sheriff of Los Angeles County to the Warden of the State Prison at San Quentin, and to be by him executed and put to death by the administration of lethal gas in the manner provided by the laws of the State of California; and the Sheriff is directed to deliver the said Admiral Dewey Adamson to the Warden of the State Prison at San Quentin within ten days from this date, to be held by said Warden pending the decision of this case on appeal; the Sheriff is further commanded to take the said Admiral Dewey Adamson to the State Prison at San Quentin and deliver him into the custody of the Warden of the State Prison, and the Warden is commanded to hold the said Admiral Dewey Adamson pending the decision of this case on appeal, and upon the judgment becoming final to carry into effect the said judgment of this court at a time hereafter to be fixed by the order of this court within said State Prison at which time and place said Warden shall then and there put to death the said

Admiral Dewey Adamson by the administration of lethal gas.

It is the further judgment and sentence of this court, [fol. 574] for the crime of burglary of the first degree, of which the defendant has been found guilty under count two of this information, after said prior convictions, the said Admiral Dewey Adamson be imprisoned in the State Prison of the State of California for the term prescribed by law. The sentences just imposed to run concurrently with one another, and to run concurrently with the sentences imposed under Information 98859 and 98734, which were consolidated, and for which the defendant has just been previously sentenced.

Mr. Safer: I ask for a stay of proceedings now, so the defendant may be here for a while so he will be available for conference.

The Court: Not under this statute. The statute provides the defendant must be taken to the State Prison within ten days.

[fol. 575] Reporters' certificate to foregoing transcript omitted in printing.

[fol. 576] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

JUDGE'S CERTIFICATE

I, Charles W. Fricke, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, and being the judge who presided at the trial of the above entitled criminal cause, do hereby certify that the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination, within the time allowed by law; and the same is now, therefore, approved by me this 9th day of Jan., 1945.

Chas. W. Fricke, Trial Judge.

[fols. 577-578] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

JUDGE'S CERTIFICATE

I, Charles W. Fricke, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, and being the judge who presided at the trial of the above entitled criminal cause, do hereby certify that no objection has been made to the within transcript by either the defendant or his attorney, or the District Attorney, within the time allowed by law; and the same is now, therefore, approved by me this 9 day of Jan. 1945.

Chas. W. Fricke, Trial Judge.

[fol. 579.] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

Department 43. Hon. Charles W. Fricke, Judge

No. 98734

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ADMIRAL DEWEY ADAMSON, Defendant

Reporter's Supplemental Transcript

APPEARANCES:

For the People: S. Ernest Roll, Esq., Deputy District Attorney;

For the Defendant: Milton B. Safier, Esq.

[fol. 580] Monday, November 20, 1944; 9:30 o'clock A. M.

Mr. Roll: May it please your Honor, counsel for the defendant and members of the jury: I will say at the outset of this case, as in any case of importance, that in approaching the case, discussing with the jurors, as I comment upon the evidence and I quote as being the testimony in the case something which, according to the record in the case, does not appear to be in the testimony; I ask you to disregard

my statement as being the evidence and take only the record of the witness' testimony, and chalk it up as an inadvertence on my part. And if, during the discussion of questions of law which will be involved in the case, you find I make any statement as to what I believe his Honor will instruct you concerning the law, and it comes time for the instructions, you hear them, and the court instructs you otherwise, I ask you to disregard what I have told you. I believe the court will give you, and follow implicitly the court's instructions.

You learned at the outset of this case, while you were being questioned as jurors,—you were asked this question either by the court or by one counsel or the other, that the only evidence that you would consider is that which you would hear here in court, and the only law you would consider is that given you by the court. And I ask you to bear that in mind as we approach this case.

I do not stand here, members of the jury, in the capacity [fol. 581] of representing any private client. I stand here in the capacity of a sworn officer of the law, a part of the District Attorney's office, for the purpose of presenting the facts available to you, intending to see that a proper verdict is arrived at. My obligation is to the People of the State of California and to the defendant in this case. I do not owe any obligation to a private client.

Let us approach this case first with reference to the nature of the charges involved. You heard at the outset that this defendant is charged with two offenses: one, the offense of murder, and, second, the offense of burglary. It is alleged in the information which has been filed against the defendant that these two offenses which occurred on the date of the 24th of July, 1944, as far as the count of burglary is concerned, it reads that the apartment of one Stella Blauvelt, 744 South Catalina Street, City of Los Angeles, County of Los Angeles, State of California,—now, the court will instruct you, I believe,—taking the offense of burglary,—that every person who enters a room, apartment, house, dwelling of another with the felonious intent of committing either grand or petty theft, is guilty of the offense of burglary. The court will further tell you, in order to convict a person of this offense, there must be shown specific intent. In other words, a person must have that intent at the time entry was made, and the court will also, I believe, instruct [fol. 582] you that the intention with which an act is done

by a particular individual is manifest by the circumstances surrounding the commission of the offense in the sound mind and discretion of the accused. Those, generally, will be the instructions which I believe the court will give you concerning the offense of burglary.

Now, in so far as the offense of murder is concerned, the court will give you a definition of what goes to make up and constitute the offense of murder. Murder, I believe the court will tell you, is the unlawful killing of a human being with malice aforethought, the unlawful killing of a human being with malice aforethought. The Legislature has seen fit to divide murder into degrees, divided it into first and second degree. And in so far as making the division of murder is concerned into those two degrees, the law says that anyone who commits a murder during the perpetration of certain offenses, one of them being burglary, is guilty of the offense of murder of the first degree.

Now, with reference to the interpretation of those instructions, in view of the testimony that has been introduced into this case, eliminating entirely from—at this time from the question as to the identity of the perpetrator, I think that under the testimony in this case the evidence shows that the only reasonable conclusion, the only conclusion which has been proven beyond any reasonable doubt, is that the murder was perpetrated in the commission of a burglary. That being so, it would be a murder [fol. 583] in the first degree.

We find from the testimony—I will go into it in detail a little later—of Dr. Webb as to the cause of death, we know that Mrs. Blauvelt died by the primary reason of strangulation. We know from the nature of the testimony, what we find there, it certainly was not self-inflicted; it was done by some other person. We know in addition to that, in talking about the degree of the murder, that Mrs. Blauvelt did have in her possession and wore—we have gone as close as 11:30 on the morning of the 24th, by Mrs. Turner, the lady who was employed at Bullock's, placing the diamond rings on her finger. We know those diamonds were missing from her apartment and from her person when her body was found. In addition to that we know, unquestionably, that entry was made into this apartment by means of going into this servitor or garbage disposal unit. Now, that evidence of the diamonds being missing and the evidence of the manner in which the entry was made goes to

this question of the intent of the person that made the entry; that is evidence of their intent.

For example, if you members of the jury, some of you would be so unfortunate this evening as to go home and find that a screen had been cut, that a window had been forced and you got into your bedroom and you found that numerous articles were gone from your own personal belongings, you would know there had been a burglar in that [fol. 584] house. Just the same in this case, we know that the person that made the entry through the servidor, the rings being gone, and the manner of entrance, that person went in there for one purpose and that purpose was to commit burglary. So I say, leaving out the question of the identity of the perpetrator, that the only conclusion we can come to is that the burglary was one which occurred—the murder was committed during the burglary, and it was first degree burglary.

Now, let us look at the testimony in this case. Up to this noon we had a number of pages of testimony, and that does not include this afternoon—441 pages of testimony in this case. But let us start out and trace, first, Mrs. Blauvelt's actions prior to the time of her decease. In tracing that, I am going to read to you from my notes, excerpts I have taken of the testimony here. I can pick out the books and go through them, but it would take a little longer. I am going to try to do it the shorter way.

So, we will start out with Saturday, the 22nd day of July, 1944. If counsel desires to check me on this I will refer him to the volume and page where this testimony is found. We find on Saturday morning—this is in Volume 3 at page 122,—Mrs. Vandiver, the lady who lived downstairs in the apartment, saw her that morning. She says that she came to her apartment on the way downtown, and she stayed ten or fifteen minutes. On cross examination counsel asked her—this is in Volume 3, page 132,—“What [fol. 585] time of day did you see her at that time? A—Well, I would say about 10; between 10 and 11. Q—Did you have quite a little visit at that time? A—Oh, about ten or fifteen minutes; I don't know.” Then we find out from Mrs. Watts, Maud B. Watts, that on Saturday Mrs. Watts met her in the city of Los Angeles at the tea room, which is described in her testimony; that they went to see a picture called “Mark Twain”, and after that they went to Sheetz at Seventh and Hill Streets, she leaving her at

4:30 or a quarter to 5 on Saturday afternoon. That appears in Volume 2, page 45.

“Q—With reference to the date of the 24th of July, 1944; which date, I believe, was on a Monday, when had you last seen her previous to that time? A—On Saturday, the 22nd, we were together— Q—Saturday, the 22nd of July? A—Yes, all day. Q—Where did you meet her that day? A—At Bullock's, up in the tea room, and we had lunch together, went across the street and saw a Mark Twain picture and then visited afterward. Q—About what time did you leave her on that day? A—I left her about 4:30 or a quarter to 5.” Then she mentioned leaving her at Sheetz.

Then, on Sunday, the 23rd of July, we find out from Mrs. Bailey, the lady who had previously been a neighbor of hers for some period of time prior to Mrs. Blauvelt's moving to the apartment there on South Catalina—that [fol. 586] on that Sunday afternoon she saw Mrs. Blauvelt at her home. Page 220, Volume 4.

“Q—About what time did you see her? A—She came about 2 o'clock in the afternoon. Q—How long did she remain at your home, Mrs. Bailey? A—Until a quarter of 5.”

You recall the lady said that she took her in her car, it was just a short distance from where she lived, and drove her up to the apartment and let her out. Now, that accounted for Sunday.

Let us get down to Monday, the 24th day of July, in the morning, Monday, the 24th day of July. It appears in Volume 2, page 71. Mrs. Massey, the apartment house manager, saw her twice on the 24th. I will refer to one time; and then I will take up these other times later on. Page 71: “Q—About what time would you say that you saw her? A—I saw her once at 10 o'clock; she was ready to go down—to come downtown, and about 3 or 3:30 she came back.”

Now, we find out from Mrs. Turner, the lady that worked at the lending library at Bullock's Downtown, that she, Mrs. Blauvelt, was in there that day of the 24th about 11:30, as I recall her testimony, in the morning, and that she then took out a book, which the lady produced here in court, called “D-Day,” and that was the last time she saw her alive.

[fol. 587] We then come back to the apartment and we find Mrs. Blauvelt coming into the apartment, according to Mrs. Massey and according to Miss Massey, who testified here today, some time between the hour of 3 and 3:30. Mrs. Massey was asked these questions on page 71, about the return: "Q—Now, will you state where you were when she came back? A—Right opposite the elevator, counting the linens, the laundry and linens, and putting it in the closet, in the linen closet. And I talked to her. I opened the elevator—she had a few packages, so I opened the door of the elevator so she could get in easy. That is the last time I saw her."

We find that she was dressed in blue.

"Q—What kind of coat did she have on? A—Well, it was something like this, but blue."

You recall Mrs. Massey at that time had a coat on, and she said, "Something like this, but blue." We find out from her daughter, with reference to the attire that she had on, that is, particularly the outer coat that she had on when she was found by the officers, that was the way she was attired. So we have traced her actions up to the time she entered the apartment.

With reference to the testimony of Mrs. Turner concerning the book, it is interesting to note just a little detail that sometimes may be overlooked and which is shown by the photographs. One of the photographs introduced here [fol. 588] in evidence to show the living room of Mrs. Blauvelt as discovered by the officers the next day—I refer now to People's Exhibit No. 8, just to show you how the testimony can tie in. If you will look on the table shown there in the background, right on this table here, you can see the book "D-Day" sitting right on the table. That is certainly corroboration of the testimony of Mrs. Turner that the lady was in there and that she did procure that book.

Now, let us go back and trace what the evidence discloses concerning the rings as worn by Mrs. Blauvelt. We have the testimony of Mrs. Watts, who gives a rather comprehensive description of the rings. You remember, she is the lady that had known Mrs. Blauvelt for some period of time; she is the lady whose husband was appointed administrator of the estate. And here is what she said about the rings; page 49 of the transcript, Volume No. 2, giving you a description. She said one was a gold wedding ring. "A—

The next ring was a large solitaire, and I judge, by my own ring that I had, that it was about a carat and a half or a carat and a quarter. It was gold underneath, but the setting, the prongs were platinum. "Q—You describe this stone you call a solitaire as being a diamond? A—A diamond, a very blue, white, very clear diamond." "Q—Now, with reference to the third ring? A—Well, the solitaire in the center, that was all platinum, the whole ring was platinum and had been designed so that it was raised a little, and [fol. 589] the center stone was about the same size as the engagement or the other stone, the single; and then the surrounding stones were not chips; they were whole diamonds, but smaller."

Now, she gives a rather comprehensive description of those rings. And from the testimony of Mrs. Watts, I think that we can all say that these were rather valuable rings, particularly the stones.

Now, in so far as the possession and wearing of the rings by Mrs. Blauvelt, Mrs. Watts' testimony, which I indicated before, shows she saw her on Saturday, the 22nd of July, at the tea room at Bullock's, went to see the Mark Twain picture and left her at Sheetz's. She was asked whether she was wearing the gold wedding ring and the two diamond rings, and she said that she was. This lady also testified that she saw her at least once a week for the last six years, and she said that she always wore them except one time she had the one with the large stone off and she gave the reason, but the reason for that was stricken.

Mrs. Vandiver, the lady who lived downstairs, said that she was a resident of the apartment and she had been a friend of Mrs. Blauvelt's for a considerable period of time, and since the War she and Mrs. Blauvelt had been down to the Red Cross Tuesdays and Fridays, and I believe the place they attended was downtown in the Telephone Building, and although they did not start out together in the morning to go to the Red Cross on those days, they used to meet [fol. 590] at the street car, went downtown together and came home together. She was asked these questions with reference to her wearing rings, Volume 3, page 130: "Q—Now, Mrs. Vandiver, with reference to Stella Blauvelt, have you seen her wearing some diamond rings? A—I have. Q—More than once? A—All the time. Q—Do you recall any occasion when you saw her when she was not wearing them? A—No."

us see what Mrs. Bailey, the lady whom I previously mentioned,—Mrs. Blauvelt had gone over to her home on Sunday, the 23rd,—said about the rings.

“Q—About how long had you known Stella Blauvelt prior to her death? A—I think about twenty-five years.” This is Volume 4, page 219. She said, further on, that she had been a neighbor of hers up until the time Mrs. Blauvelt sold her home, she said, approximately two years ago, and that since that time she saw her quite frequently. She was the lady that said during the club season she saw her at least once a week, and I believe she said on Mondays, when the Ebell Club meets. And I believe counsel asked her when the club season was, and she said from July to October. She said that on this date, the 23rd, she was there from 2 until about a quarter to 5. Page 220 of Mrs. Bailey’s testimony, “Q—Did you notice whether on that day, at your home, meaning the 23rd of July, on Sunday, that she was wearing any rings? A—Yes, sir, she was. Q—Did you see them? A—I did.”

[fol. 591] Then, on page 221: “Q.— Over the period of years that you have known her, we will say, the last three or four years, limit it to that time, so far as her wearing rings are concerned, did you notice her wearing rings frequently, all the time, or what? A.— I never saw her without those rings.”

And then we have the little lady that testified here this morning, Mrs. Turner, from the lending library, who says that she observed her rings on the morning of the 24th. So we have actually traced her, practically right to the door of that apartment, wearing those rings.

What happened to the rings? You know, the testimony indicates that Mrs. Vandiver, the lady who she was accustomed to going to the Red Cross with on Tuesdays, and did go to the Red Cross, that Mrs. Blauvelt was not there on this particular Tuesday, which would be the 25th; that when she returned home, after dinner, she went up to the apartment, and, getting no answer, she went down and got the landlady, went back upstairs and observed what she has testified to here in the testimony as being fairly represented by the photographs here.

We find the officers coming; there are no rings there; a diligent search is made for the rings and they cannot be found. There is no testimony in this record whatsoever

to indicate that the rings were taken other than by this burglar. We put them in there but they are missing.

[fol. 592] Where do we hear next a question of a ring mentioned? By uncontradicted testimony, that is, the testimony of Frances Jean Turner, the woman that came into court here and testified that during the month of August, 1944, and she said that it occurred between the 10th and the 14th of August, 1944,—counsel asked her to fix the date,—she said that she contacted a man. "Who," counsel asked her, and she gave him his name, and as to having a conversation with him. She said she was able to place it between the 10th and the 14th of August—it was during the first two weeks of August. She said she was at this Colony Club at 29th and Western Avenue in the city of Los Angeles, she was seated at the bar, and she testified that she overheard this defendant say to another colored man, in substance,—here is what she testified to, page 230: "A.— Well, I just happened to overhear him ask this man if he would be interested in buying a diamond ring. Q.— What, if anything, did the man say? A.— He said no, he was not interested."

Counsel, at page 237, on cross examination, asked her with reference to the identity of the defendant: "I asked you if you may be mistaken about he being the man you saw at the Colony Club that evening. A.— No. Q.— You could not be mistaken? A.— No, I am positive it was him."

We have a positive identification. She testified, in response to some of counsel's further questions, that she had seen him previously. If you recall the testimony, some [fol. 593] place along in the record, we have them, in turn, calling each other by their first names, positive identification by someone that previously had known the defendant, as to hearing him make the statement to this man. The defendant has not taken the stand; he has not denied that; it is uncontradicted in the testimony. There he sits, not getting on the stand, not giving you what his version of the situation is. You have got the right, members of this jury, to consider the fact and consider that four hundred and some odd pages of testimony are uncontradicted from the lips of this defendant. Why? For example, during the time that Frances Turner was on the stand—it happened here in the courtroom—the defendant and his counsel went into a huddle, and then came up with some questions.

about a juke box. You remember that. He was there. That conversation happened. He has not denied it; it is uncontradicted.

So, I say that we have put the rings on Mrs. Blauvelt, put them on her on Saturday morning, unquestionably, and put them on her—it is a reasonable inference—at the time she went into the apartment.

Now, as near as we can, by the evidence in this case, come to the approximate time of her death by three witnesses. You recall the testimony of Mrs. May, who was living at the apartment right across the hall on this date. She testified that she was home on that day. And also by the testimony of Mr. Heck, the gentleman who was engaged down at the Southern California Telephone Company, who said that was his first day of vacation and he was downstairs in the apartment directly below the one which would be next door to Mrs. Blauvelt's had it been on the same floor. Now, in Mrs. May's testimony, I believe on cross examination, it appears in the record—my recollection of it—that counsel asked her, after she heard what she described in the testimony as being a frightened voice, of Mrs. Blauvelt saying, "What do you want of me?" Counsel asked her if she could fix the time, and she fixed the time at 3:30. My recollection is that she testified that she looked at the clock. That ties in with the testimony of Mr. Heck. Mr. Heck says, in so far as voices were concerned, he was not able to distinguish the voices, but he heard a scream. That is the way he described it, as being a scream. Mind you, he is downstairs.

I think from that testimony it is reasonable to assume, in view of the other testimony in this case, and particularly the fingerprints, and particularly what we heard Mrs. May say that she heard before she heard this voice say, "What do you want of me?" she heard some pounding, that this defendant, Dewey Adamson, gained entrance to that apartment by going in through this door; he was there in the apartment; that the people downstairs put her coming upstairs between 3 and 3:30, as best they can—Mrs. Massey [fol. 595] and her daughter—she comes up there and inserts the key in the lock; the defendant is in the apartment and he grabs her. You have seen the results in the photographs; you have seen that the rings were missing.

Now, with reference to the cause of death I am going to read just what Dr. Webb says; I will have to go back to the

testimony of Dr. Webb. The autopsy on Mrs. Blaauvelt was performed on the date of the 26th, and as I recall his testimony, along some time about 11 o'clock or 11:45 in the morning. This is reading from page 13: "Q.— Doctor, I believe you testified that you saw her on the 26th of July at what time, please? A.— I saw the body on the 26th day of July at 11:48 a. m. Q.— And, Doctor, could you express an opinion based on your experience as to how long, approximately, at that time Stella Blaauvelt had been dead, in hours? A.— The body was in pretty fair condition and she had been dead possibly close to forty-eight hours."

Figuring back forty-eight hours, approximately, and I think you will come to approximately the time.

On page 18, counsel, on cross examination, asked the doctor this question: "Q. Now, you testified, Doctor, that the woman had been dead, in your opinion, close to forty-eight hours? A. Yes, sir. Q. Could it have been longer than that? A. Well, the indications wouldn't lead you to suspect longer, other than it might have been an hour longer or an hour or two less. But I couldn't state right [fol. 596] to the minute. Q. It wouldn't vary within an hour or two either way? A. I wouldn't think so."

The doctor does not tie himself down to exactly forty-eight hours, by any manner of means, but that testimony of the doctor ties right in with this 3:30 occurrence on the date of the 24th.

Now, with reference to the cause of death—I am not going to read all of it, but here is what the doctor testified, as far as the pertinent points are concerned, of the autopsy performed by him: "There is extensive ecchymosis around the left eye, over the left side of the face extended upward into the left side front of the head and over the left ear. The lips are bruised and have a swollen appearance. There are three superficial bruised grooves, three-eighths of an inch across, extending around the upper neck region. An electric extension cord was removed from around the neck. On the left side the groove is slightly excoriated. From these findings it was determined that the immediate cause of death was strangulation due to constriction around the neck. Other conditions contusion of the brain due to trauma to the head."

The doctor was asked with reference to the bruise on the face, this question, page 14: "Q. And have you ex-

pressed any opinion as to how a bruise of that type or character might have been caused, Doctor? A. It is very [fol. 597] hard to state the method of causing a bruise like that which is extensive over that side. All that I can state is that either some object hit that head or the head hit some object, and that object was not a sharp or cutting object."

So we find that in so far as the cause of death is concerned, it was due to strangulation.

Going to some of the other testimony in this case, Mr. Pinker testified to making certain observations there and finding certain things at the scene. He is the witness that testified that he was there when the Coroner deputies removed the body, and when the body was removed, underneath the body he found the foot portion of this stocking, and that was introduced here into evidence. We placed in evidence the tops of three stockings found in the room of the defendant. From the appearance, I think it is readily determinable that they are women's stockings. They are tied at the top. We have the top part of the stocking that Mrs. Blauvelt had on, missing, and the whole stocking she also had on the other leg missing. Counsel on cross-examination of one of the witnesses—I believe it was Miss Massey, one of the women that saw her on that date, last saw her alive, and asked her if she was wearing stockings, and she said she was. The defendant has not seen fit to explain what these stockings are doing in his room. It is rather an unusual situation where we find stockings gone and three women's stockings in the room of the defendant. This might be a little homely expression, but possibly would come into the same category, as the man that went out to sell and did sell some chicken feed, and we find out that that man had chickens when he got home and would have use for that. Or you take another example. You find in the burglary of a store having painters' supplies, one particular type of painting equipment is used by a person and that is gone, and you go over to the individual's home who is accused of it and you find that item there. Now, I do not say that the type of stockings found in the room of the defendant are from the same stocking that was found underneath her. The evidence does not indicate that. I will say to you, frankly, they are not. But we do have this circumstance of finding those stocking tops there in the room of the defendant. When I was a kid, long before I started to get bald-headed—

maybe that is one of the reasons I am bald-headed, coupled with several other factors,—I can remember of getting some old stockings, taking the top off and making a stocking cap. Now, once in a while young people do that, and once in a while older people do it. At least, we have those in the possession of this defendant. No explanation; nothing said or testified by him as to what they are doing in his room. The record is silent.

Now, let us go down to the time that the body of Mrs. Blauvelt was discovered. We have, as I mentioned a few [fol. 599] moments before, Mrs. Vandiver, her friend, meets her at the Red Cross on Tuesday, coming to her room and she testified that she observed the Times newspaper at the door, that she went downstairs and she got Mrs. Massey, Mrs. Massey came up, put the key in the door, opened the door and went in the room, and their primary attention was directed, naturally, as anyone would, to the person lying there on the floor. Now, these photographs which were introduced here in evidence, and which were shown to Mrs. Vandiver—at least, some of them were—she said they fairly depict what she observed when she went in the room there, possibly not exactly from this angle. But we have the garment over the body; we have the two pillows over the body. It is interesting to note, even in this picture, you can see, on the left hand, there is a ring there, which is unquestionably a wedding ring. No other ring shown on the photograph. That is what these two ladies saw; they left; did not go back to the room, and phoned the police.

We placed Mr. Long here on the stand, and he testified as to what he saw there. He identified the pictures and said they were fair representations of what he observed there. After Mr. Long arrived he made some calls to other officers and those other officers came. He told you that with reference to these two pillows he picked up the top pillow and on the bottom side of that top pillow was a substance which appeared to be blood. He then said, with [fol. 600] reference to the top side of the pillow underneath, that there was no appearance of blood on that, but when he got on the bottom side of it there was an appearance of blood there. It was either Mr. Long or Mr. Brennan that testified that with reference to that blood—I believe it was Mr. Brennan—he observed the same condition as far as the pillows are concerned and that at that time it

appeared to be dry. That in itself, with reference to the condition of those pillows there, appearing to be blood, indicate that the defendant had remained in that apartment for some considerable period of time; a considerable period of time; unquestionably those pillows were changed. Why, I don't know. The man over here knows, but he does not tell. We have, in addition to the situation on the pillows—when I say a long period of time, that statement is corroborated by the testimony of Mrs. May, the lady across the hall. Now, she is, you will recall, that afternoon seated on the divan, and then later on, I believe she said around 5:30 or 6 o'clock, she went to bed. She is not definite as to the time. Counsel read it from the transcript of the preliminary hearing, and I think her time was some place between 6:30 and 8:30; somewhere in that vicinity. She says she heard a key in the lock and then she heard someone go down the back stairs. We know the key is missing; the key is gone, too. Mrs. Blauvelt, unquestionably, had the key to get in the house. The key is gone. This [fol. 601] situation with reference to those pillows corroborates that testimony of Mrs. May—

The Court: I think we will take our recess, Mr. Roll; we have got to break somewhere. The jury keep in mind you are not to talk about the case or form or express any opinion. Take a recess until 9:30 tomorrow morning.

(Whereupon an adjournment was taken until Tuesday, November 21, 1944, at 9:30 o'clock a. m.)

[fol. 602] Tuesday, November 21, 1944; 9:30 o'clock A. M.

The Court: In the case on trial the record will show the jury, counsel and the defendant present. You may proceed with the argument, Mr. Roll.

Mr. Roll: May it please your Honor, counsel for the defendant and members of the jury: At the recess last evening we were discussing something with relation to the pillows on the body of Mrs. Blauvelt, as found there by the officers. In People's Exhibit 8, which you have seen and which has been testified to here, reflects what the officers observed so far as the pillows were concerned. They have testified there were two pillows there, the large pillow being the one on top, and I think by looking at the chair which

is shown in the photograph you can see that the large pillow came from this chair over here; it is the same material. It is one of those chairs that the back can be taken out. Now, both Mr. Long who, apparently, was one of the first officers there, and Mr. Brennan, testified that in taking these pillows off, when they got to the bottom side of this first pillow, there was a substance which had the appearance of blood on the bottom side; that there was no appearance of blood on the top side of the smaller pillow underneath, but when they removed the smaller pillow off the face there was a substance which had the appearance of blood on the [fol. 603] inner side of the small pillow. You know and I know that it would take some period of time for blood to dry. For example, if this larger pillow, without the blood having been comparatively dry, had been placed on top of the smaller pillow—naturally, it would be placed there with the blood on the inner side—it would have left some blood on the top side of the smaller pillow. But none was observed; none was found. I think it is a reasonable deduction to say that this larger pillow was apparently dry before it was placed back on the body. Now, there is one explanation for that, and the reasonable explanation would be this: That one of these pillows was used to stifle or snuff the breath out or cause Mrs. Blauvelt to remain quiet.

Going back to the testimony of Dr. Webb. We find that the face, as depicted in the photograph, is in pretty bad condition; Dr. Webb said that that condition was caused either by some object hitting the face or the face hitting some object. I think it is reasonable to assume that the pillow was used to momentarily snuff out the breath of Mrs. Blauvelt, and then as the final thing that was done to remove the breath of life from Mrs. Blauvelt, was to jerk off this light cord that is attached to the lamp and wrap it around the neck three times, as shown in this photograph here.

Now, while we are talking about this lamp cord causing her death by strangulation, I desire to direct your attention [fol. 604] again back to an instruction which I believe his Honor will give you, as I stated to you yesterday, as to the degrees of murder. I believe I told you yesterday that the court would instruct you that murder is the unlawful killing of a human being with malice aforethought. When we get into the degrees of murder, the court will tell you that all murder which is perpetrated by means of poison

or by lying in wait or by torture or in the perpetration or attempt to perpetrate rape, robbery, arson and a couple of other things; is murder in the first degree. Now, I direct your particular attention to that portion of the law which says that all murder which is perpetrated by means of torture is, in and of itself, murder in the first degree. And I state to you, members of this jury, that using this cord to snuff out that life by strangulation was unquestionably and undoubtedly murder by torture. So, that is another theory separate and apart from the theory of burglary, which makes this effectually and actually first degree murder. I think that is reasonable, and I think the law bears me out when I say that when a murder is perpetrated by means of strangulation, such as was done here, it is a murder by torture. Now, I directed your attention to this situation with reference to the pillows for the purpose of showing you that a considerable period of time elapsed there in the room while this defendant was in there.

Now, there is in evidence here, and you can consider [fol. 605] that when you get into the jury room, and I am going to show you the pictures now and ask you to look at them later on, when you get into the jury room—this is Exhibit No. 34. You remember when Mr. Brennan was on the stand I asked him to describe the condition of the clothing of Mrs. Blauvelt there after they had taken the coat off of her body, and I had him point out on me, roughly, with reference to the appearance of the dress and the apparent location of the dress, how it was pulled up. As I recall his testimony, he indicated about my hip bone on one side and on the other side about 4 inches below. This photograph will depict that partly, but, as I recall, Mr. Brennan testified that that photograph was taken for the purpose of showing that the under garments or pants that Mrs. Blauvelt had on were turn across the crotch. Now, by looking at People's Exhibit 34 you can see in that exhibit what appears to be a portion of a woman's garment used for the purpose of holding up the stockings. We know from the testimony that the stockings are taken off. We know that the shoes are off when the body is found. We know that the lower portion of her body, when the brown coat is removed, is entirely exposed up to the position that Mr. Brennan said. Now, the defendant has not explained that. He has not told you why. I would have liked to find out, if he had gotten on the stand, and I think you would

have liked to have known why. I ask you, when you get [fol. 606] into the jury room, to look at People's Exhibit 34.

Now, going back—and I referred to this yesterday—to the testimony here in the record of Catherine May. I will read to you some of her testimony. Reading from page 307: "Early in the afternoon I heard a hammering in the hallway, and still a little later I thought someone was knocking at my door, my door kind of rattled, and I listened again and heard another sound, but I knew definitely it was not my door anyone was knocking at, and still later in the afternoon, about 3:30, I heard—Q—Wait a minute. Now, let me ask you with reference to this hammering. Can you fix that approximately, what time the noise that sounded like a hammer to you? A—Well, I could not say the definite time, but I would say it was, oh, perhaps an hour before 3:30 when I heard Mrs. Blauvelt, an hour or an hour and a half. Q—Now, you started to mention approximately at 3:30 you heard something. What did you hear at approximately 3:30? A—I heard Mrs. Blauvelt say, 'What do you want of me?' Q—Where were you in your apartment at that time, do you remember? A—I was on the divan. Q—On the divan? A—Yes. Q—Did you hear any audible words in reply to Mrs. Blauvelt's voice saying, 'What do you want of me?' A—No, I just heard a low mumble; I could not distinguish what it was. Q—You say you heard a low mumble but you could not distinguish the [fol. 607] words? A—No, I could not distinguish the words. Q—Can you describe the tone of Mrs. Blauvelt's voice? A—She sounded frightened; her voice did not sound natural. Q—What, after that, was the next thing that you recall hearing? A—Well, later that evening I heard a key used in the lock of her door and, still later, I heard someone come out of her door and go down the back stairway. Q—Now, is there any way you can fix the time of those two instances? A—Well, I can't tell definitely. I would say it was after 6:30 and before 8, or around 8, that I heard the key used, but it was later than that that I heard someone going down the back stairway."

I will go over to page 312, the cross examination as to some of these times. This lady could not fix the times. Counsel, on page 312, on cross examination, asked her this question: "Q—Now, what time was it you heard Mrs.

Blauvelt's voice say, 'What do you want of me?' A—"That was at 3:30 in the afternoon."

This is the only approximate, definite time that she actually fixed.

"Q—How do you fix that time? A—I looked at the clock. Q—You looked at the clock after you heard the voice speak or before? A—Well, that I don't remember. It was probably after, because I wouldn't have looked before."

Then, further on: "Q—Now, what was the next thing that [fol. 608] you heard that was unusual? A—The key being used in the lock—that was not unusual; I just noticed it after hearing the remark in the afternoon. Q—Then, about what time was you heard the key in the lock? A—The time I am not sure of. It could have been any time between 6 and 8 o'clock. Q—I am sorry; I did not hear. A—I said it could have been any time from 6 until 8 o'clock. The time I didn't notice. Q—It was some time between 6 and 8 o'clock. Well, can you tell us about how much time elapsed from the time that you heard Mrs. Blauvelt's voice until you heard the key in the lock? A—No, I can't."

Now, going over further on that same subject to page 319 of the transcript, still on cross examination by Mr. Safer: "Q—Can you give us an approximation of the time that elapsed between the time you heard the key in the lock and the door close and the footsteps? A—No, I cannot; I haven't any idea what time elapsed. Q—Well, would it be a matter of five or ten minutes, or a matter of an hour or two hours? A—I don't know; I don't remember."

Now, we do know, however, that a considerable period of time elapsed before the room was left.

Now, let us talk about the manner of entrance, how this defendant got in the place. You all remember Mr. Frick, the rather small gentleman who said, in response to counsel's questions, that he did things at the order of his [fol. 609] wife; he is the man that worked there as janitor. Counsel wanted to know, after he had testified as to the facts that he had gone in there, why he went in there, and he started to tell about a lock being changed, that they didn't have the key, and then counsel wanted to know at whose suggestion he went in, and the witness said, "My wife," and the court said, "That settles that." I think you all recall Mr. Frick. I am going to read some of his testimony here concerning this door and some of the mat-

ters connected therewith. You recall that after I found out his occupation, how long he had been there, and his general duties there, I asked these questions, reading from Volume 3, at page 161: "Q—Now, with reference to that garbage disposal unit, I am going to ask you some questions, Mr. Frick. How tall are you, sir? A—Pardon? Q—What is your height? How tall are you? A—5 foot 7½. Q—What is your weight? A—130. Q—Do you want to step down here, Mr. Frick, right alongside of where the defendant is seated? A—Yes." You remember at that time he walked over and stood in this position, and I said, "I will ask if the defendant might stand, please." And the court said, "The defendant will stand for the purpose of identification." You remember that the defendant stood right alongside of Mr. Frick, and from that observation you could very easily see there was not practically any difference in the size and [fol. 610] approximate weight of these two individuals.

Mr. Frick was then asked these questions: "Q—Now, did you have occasion, Mr. Frick, some time after the date of the 25th of July, 1944, to yourself try and—not try, but crawl through that garbage disposal unit, from D-1 to D-2?"—and pointed it out on the board, the position of D-1 comes from the hallway into the kitchen. His answer is: "Yes, sir. Q—Just tell us what you did. Did you get through or did you get stuck? A—No, sir, there was plenty of room. Q—You did get through? A—Yes, sir. Q—About when did you do that, do you know? A—Oh, about six weeks ago."

Now, going over to page 165: "Q—Now, directing your attention, now, sir, to the date on which Mrs. Blauvelt's body was found, the morning of that date, the 25th day of July, 1944, did you on that morning have occasion to go up on the fourth floor and do anything with reference to the garbage in Apartment 410? A—Yes, sir. Q—What, if anything, did you do, sir? A—Pardon? Q—What did you do with reference to that? A—Well, I found that the garbage tin was not in the place where Mrs. Blauvelt usually kept it. Q—Where was it, sir? A—It was in the corner, in the other corner, I would say, the southwest corner of the service board. Q—About how large a garbage container was that, can you indicate with your hands how big a container it [fol. 611] was? A—Oh, the container is about 8 or, I will say, 9 inches, the container about 12 inches high. Q—About 12 inches high and 8 or 9 inches across? Yes. Q—And in

so far as the garbage itself was concerned, did you pull the can out that morning? A—Yes, sir. Q—Do you recall whether there was any garbage in there or whether there was not? A—Yes, sir. Q—Well, what was the situation? A—There was nothing in it. Q—Nothing there? A—No, sir. Q—Now, in doing that, Mr. Frick, can you tell me when you reached in to get the garbage out, did you bend down to do it, or do you do it from a crouched position or get down on your hands and knees, or how do you do it? A—Well, I would say a crouch. Q—Now, did you look into the unit at the time, or just reach in and get the can and pull it out? A—I just pulled it out; I didn't look. Q—You didn't pay any attention? A—I didn't pay any attention only to where the tin was located. Q—So you are unable to say anything with reference to the door there on the inside? A—No, I don't know about that. Q—You did not look for that at all? A—No, sir, I did not look."

Now, we will go to page 170, Volume 4; this is on cross-examination; page 170, line 13: "Q—Now, was there a shelf in that garbage compartment at the time you made that experiment? A—Yes, sir. Q—Did you crawl—you did crawl through there, didn't you? A—Yes, sir. Q—Did [fol. 612] you crawl under or over the shelf? A—Under. Q—Under the shelf. Are there some pipes in there in that compartment? A—No, sir. Q—No pipes in that— A—Just lined with tin."

Now, reading on page 185—these questions were asked on redirect examination: "Q—Mr. Frick, counsel asked you with reference to the locks. Did you have any complaint from any source around the 24th or 25th of July or we will say, the 22nd, about that lock being out of order?"

There had been testimony concerning the lock on the door, by Mr. Frick, as to how the lock would open; you could push a little tumbler on the side of the lock; I think you recall that.

"A—No, sir. Q—Did you have any complaint about that door there, the inside door, which you marked on the diagram as D-2? Anything being wrong with that? A—Leading to the kitchen? Q—Yes, sir. A—No, sir. Q—Did you have any complaint about that? A—No, sir."

Now, from that testimony as given by Mr. Frick, we can say that in so far as that door is concerned at the time Mrs. Blauvelt lived there, that door unquestionably was intact. There is no complaint made about any condition of the

door in the kitchen, and this gentleman is, apparently, the one that does minor repairs, does the work around there, and the man who would know about it if there was [fol. 613] something wrong. So we know that from that testimony that door was intact.

Now, with reference to the door itself. We find from the testimony of Mr. Long, the first officer that arrived there, and he testified concerning People's Exhibit No. 18, that this door was approximately in this position at the time that he arrived there. With reference to the papers under the door, he said that the papers were not under the door. Counsel examined him quite extensively concerning that. I don't know whether counsel has forgotten it. Mr. Ferguson, the gentleman that dusted the prints, had testified concerning how the papers got under the door. Mr. Ferguson says that he put the papers under the door there so that the dusting powder would not get on the floor.

Now, let us see, in view of some of the subsequent cross examination of some witnesses yesterday, what Mr. Ferguson has to say as to what occurred there, what he did, what transpired. I am reading from page 198: "Q—Directing your attention to this photograph, Mr. Ferguson, I will ask you to examine that photograph and state whether or not that is a fair representation of the kitchen in apartment 410 at 744 South Catalina Street. A—Yes, it is. Q—Now, I notice in that photograph that there are some newspapers there on the floor. Were those papers there when you arrived? A—No, I put those papers on the floor myself to keep the black powder from getting on the floor. [fol. 614] Q—I notice in the photograph, right in the forepart of the photograph, what appears to be a door. Where was that door there in the apartment when you first saw it? A—Approximately the same place it is now in the photograph."

Going over to page 200: "Q—Now, with reference to People's Exhibit No. 6, did you do what you call dust People's Exhibit 6 out there at the apartment itself on the evening of the 25th of July, 1944, for the purpose of determining whether or not there were any fingerprints on that door? A—I did. Q—And did you find some fingerprints on the door? A—I did. Q—What did you do after you found the prints on the door? A—After I found prints I made labels, placed them next to the print where they

would show in the photograph, placed the camera over the label and the print, and photographed the print and the label on the door. Q—How many different photographs did you take of fingerprints on the door there? I mean, different locations. A—Three different photographs of prints on the door. Q—And then later on—I will get into this later—later on did you cover over that area with this Scotch tape, where you took the photographs? A—I did.”

Reading from page 202: “Q—Do you have in your possession at this time the negatives of those pictures that you took? A—I do. Q—And do you also have smaller [fol. 615] developed pictures from there with you, or not? A—I do.”

He then produced the smaller pictures which were marked into evidence. They were marked, as I recall, 19-A, B and C.

Reading now from page 210—this is cross examination by Mr. Safer—page 210, lines 8 to 16: “Q—You testified that you placed the papers that appear in this picture, Exhibit 18, underneath the door? A—I did. Q—Did you handle the door in doing that? A—I merely touched the edges very carefully while I was placing the papers under it. Q—You touched the edges of the door? A—I touched the edges only.”

Now, we find from his testimony that there at the scene on the night of the 25th he took and dusted this door and took what he describes to be only three prints that could possibly be identified, two on the front side of the door and one on the reverse side of the door, and puts a label on the door—and it is shown here in the pictures—so that film itself could be easily identified, as to what portion of the door it came off of, on all three positions. Then, in addition to that, he did what he called—took a lift print, which is introduced here in evidence. Now, so there won't be any question whatsoever, and there can not be any question whatsoever, with reference to these enlargements and these photographs as being the ones that came from the door, [fol. 616] you will recall the testimony of Mr. Rogers—I will go into it in detail later on—and I think I should point out, at least, in two places in the transcript where Mr. Rogers testified that he received the negatives, those being the negatives that Mr. Ferguson first, apparently, took there that night. He received those negatives and he compared the negatives and the small pictures from those negatives

with the actual prints on the door. That was the first thing he did. And he said those negatives—those photographs were pictures of the prints on the door.

Now, the reason I am covering this at this time in some detail is due to several factors. Counsel spent considerable time yesterday questioning about the possibility of forging prints. That was the first thesis. We find out from the testimony there was no forgery whatsoever. Then, the second attack that he made was when Mr. Brennan and Mr. Wiseman were testifying. You remember Mr. Brennan testified that the door was brought out there in the police station; shown to the defendant, the prints pointed out to him, and then he wants to know if the defendant did not touch the door. Grasping at straws; trying to explain away these prints. We find out that he did not touch the door at the station, and he has not testified here on the stand that he ever touched the door there at the station. The record is silent as to that. That is the reason I am going into some [fol. 617] of this in detail, with reference to those prints there on the door. This may be diverting a little bit at this time, but this is not the only occasion when there has been a grasping at straws in this case.

You remember, when Mrs. Vandiver was on the stand, counsel in cross examination asked her about some stranger, some newsboys being in there. She said yes, there was one there. Well, to let you see, we brought in Kenneth Osmon, the fifteen year old boy. Grasping at straws; trying to pin it on somebody else; trying to get away from these fingerprints. I am glad I brought him in. I wanted you to see him.

Now, going back to the fingerprints. Mr. Ferguson testified with reference to taking the prints. Then we placed Mr. Larbaig on the stand. Mr. Larbaig testified that on the date of the 31st of August, 1944, he himself rolled two fingerprint cards of this defendant. They have been marked in evidence as People's Exhibits 22 and 23. He said, with reference to the time that he rolled People's Exhibit 22, which appears right on the face of the card, that was done at 8-31-44, at 2:10 p. m.; and with reference to People's Exhibit 23 in this case, that was rolled at 2:12 p. m., on the same date. Now, I am going to show you something interesting with reference to some of the questions counsel asked with reference to possible differences in [fol. 618] prints. Now, mind you, these prints were rolled

under ideal conditions. I am going to pick out one print that is involved here, the one on the back of this door. Here are two prints rolled within two minutes of each other, and there is a difference between those prints and this print here in several respects. If you will notice, a portion of the top of the print does not show quite as much as it does down here. We can all see that. Just notice those prints, the similar portion, here and here, and then the prints down here. It appears to be a little more full in the bottom also. But in so far as what we call the pattern area is concerned, we certainly have the pattern area there. At any rate, Mr. Larbaig testified to rolling these prints. He then testified that from the rolled card—I believe No. 23—either one of the two of them—either 22 or 23; it may have been 22—he made the enlargement which has been marked People's Exhibit 25. This is the one, you remember. He also caused to be made an enlargement of the print which is on the back side of the door here, which is People's Exhibit 24. He testified at considerable length. He explained to you the points of identity. He said that in his opinion the two prints were identical and were the prints of the defendant. Now, here is People's Exhibit 26; here is the blown-up picture of the negative in evidence; what Mr. Ferguson testified that he placed on there at the time he made it, a card [fol. 619] in his own handwriting. It shows up pretty well in this other picture. With reference to 26 and 27, we have these photographs enlarged by Mr. Larbaig. He testifies that these photographs are photographs of the right ring and right little finger. He makes a comparison and shows you in detail how they compare. He said that they are the prints of one and the same person and the prints of the defendant. That is two more prints—that is three. Then, we have in evidence here the next two photographs, Nos. 29 and 28, one being the blown-up print, taken on the door there by Mr. Ferguson, and so labeled on it; the next print being the blown-up from the fingerprint card of the defendant. He makes a comparison and indicates those fingers are the fingers of one and the same person, the fingerprints of the defendant. I then asked Mr. Larbaig to place there on the blackboard the relative position—indicated up in this corner—of those prints on the door. This indicates the front part of the door, the door knob and the hinges down here, and he indicates where those fingers were. Now, taking this door—I will place it down here—we will

get the same relative position as this top photograph—and bear in mind this situation with reference to the door—I think it is fairly well shown here on the photograph of the kitchen—I cannot find it—Well, at any rate, we have the photograph here. Wait a minute. Here it is. You [fol. 620] recall the testimony is that with reference to the hinge section of the door, which is over here against the wall—in other words, there is a small space here, which is against the wall, the hinge part of the door there on that side. In other words, the wall, in the photograph, comes right out at an angle; if we can assume that; this is the wall coming right out here on this side of this door. Now, just look at that door with respect to the position of the fingers, and considering where this wall comes out here, and taking this side over here, the left index finger, left middle, and left ring—index, middle and ring—now, watch the location there. If you are on the outside, if you put them on this way, as I have got them here—I don't know whether you can see me or not—I will get this door up higher—

The Court: If you want to come up here, Mr. Roll, it is all right.

Mr. Roll: No, I don't think so, your Honor. Can you hold it here Mr. Davis?

(Mr. Davis does as requested.)

Mr. Roll: Also in this connection—it is shown on the photographs—we have the tips of the fingers over in the center area. The trouble is, we blocked that off. Maybe this will be better. You still have to put this wall up here, and bear that in mind also. Now, if I come on the face side of the door and start putting my fingers there that [fol. 621] way—I have got them headed the wrong way, because the tips are in this way—if I get around on this side, I have got the wall there. See? The left index, left middle and left ring. You can do the same thing with reference to that door, closed, with reference to the other side. So we have the door fitted onto this place here. With the door shut I say it is a physical impossibility to put those fingerprints on there, standing in front of that door; you cannot put them on in that position, and I don't care if you are a contortionist. We have to have fingerprints on the inside of the door.

Now, going into the testimony of Mr. Rogers. Mr. Rogers was appointed by the court and is known as the court's witness. He was appointed under the provisions of Section 1781 of the Code of Civil Procedure. The court has the power and can in any case, either civil or criminal, in a matter involving expert testimony, either on his own motion or on motion of either side, appoint a qualified expert to make an examination and come in and testify. When a man is appointed the court's expert, he is the court's witness; he is not a witness for one side or the other. The theory being to get someone entirely impartial and removed. And I say that in so far as Mr. Rogers is concerned, he was entirely impartial and removed as far as the testimony in this case is concerned. Let us look at the transcript in this case, so far as Mr. Rogers' testimony is concerned. I [fol. 622] think you will find several places in the transcript where he tells you that—let's see if I have it marked here. Page 358: "Q—In so far, Mr. Rogers, as your appointment in this case is concerned, you were appointed by the court; is that correct? A—Yes, sir. Q—You have not consulted, or have you consulted with Mr. Larbaig concerning this whatsoever? A—No, sir. The Court:—You really did not know what the case was about until it was handed to you? A—No, I didn't know the circumstances of the case. In fact, I had forgotten the details of the case. I knew nothing of it until the court handed me the exhibits yesterday afternoon."

So, from Mr. Rogers' standpoint, he came in here, you might say, cold, with reference to any knowledge of the fingerprints or anything; he made comparisons and he came in here and he testified. As I say, he at first said that he checked the negatives and checked the small prints against the actual pictures of the prints on the door and said they were pictures of the prints on the door. He rolled the prints of the defendant, People's Exhibit No. 30, and made an enlargement of one of the prints, which has been marked here People's Exhibit 31. This is an enlargement of the print on the reverse side of the door. He testified in detail as to making a comparison between those two prints, and he used the diagram on the blackboard, and I think all of us got a good lecture on fingerprints not only from Mr. [fol. 623] Rogers but from Mr. Larbaig. He told you all of his experience, all of his background, and said in his

opinion these prints were the prints of the defendant. Now, not only these, but with reference to the other prints, they were the prints of the defendant.

I happened to be working on this case, just as a little side line last night, and being married, my wife likes to listen to the radio—I have no control of that situation—sometimes, subconsciously, you are working on something and listening to something else. Dr. I. Q. was on the radio last night, and I heard him ask this question, which I knew immediately what it was, and I thought to myself, “Well, all the jurors would be able to answer the question that was asked.” They asked this question of some individual there—and I think they got \$22.00 for answering it—they didn’t answer it correctly—they said, “If you went to a police station and saw some individual at the police station who was interested in a subject, and he said, ‘Loops, whorls, arches and tented arches’, what particular type of work would that man be in?” Well, the man didn’t know the answer. I think you and I, and anyone else in the courtroom would certainly be able to answer that question last night. That is just the way it passed, and I happened to be working on the testimony of Mr. Rogers when that matter was discussed on the radio.

I think all of us would agree, with reference to both of [fol. 624] those gentlemen who testified here, that they each went to great pains to explain fingerprints generally, how they are made, went into details concerning how you make comparisons, how you classify prints, and told you all about them.

Now, fingerprints are something that the most of us have general knowledge of. We know generally what some of the uses are. They are used in many ways other than in police work. They are used out among industries, particularly those who are engaged in defense work. Practically all the individuals working out there have fingerprints made. You take everyone that is in the armed service—we have some 12,000,000 men in the Armed Service—the fingerprints of all those men are taken before they go into the service, and they are used. Some of your banking institutions at this time use fingerprints. You people that have a California driver’s license—I do not know whether they are still doing it, but they did do it for a while, and it is voluntary on your part, if you desire, you can have your

print placed on your driver's license card. The Armed Service use these prints in several ways. If there is a lost man or a man goes A. W. O. L. or something like that and they want to identify the individual, they do it by means of fingerprints. With reference to your driver's license, it comes in handy there, and with reference to your defense plants it comes in handy there. The Federal Bureau of Investigation has, unquestionably, on file lots of prints. [fol. 625] Everyone, for example, working under Civil Service, at least in the State and local Government, is fingerprinted. I do not know how many times they have taken my fingerprints, sent them back to Washington and kept them there. It is a method that is readily and easily recognized as being a proper and correct method of identification.

We found out from these two witnesses, both Mr. Rogers and Mr. Larbaig, if I were to ask them to put the figures there on the board as to how someone mathematically figured out the possibility of two persons having like fingerprints, I don't think there would be enough room on the board to get all those ciphers or zeros on it, because it is just a possibility.

So, I say, so far as the fingerprints in this case are concerned, they were positively and definitely identified as being the prints of the defendant. That being so, we know the defendant came in through that garbage disposal door; we know he was in the apartment; no question about it.

You were questioned here with reference to direct and circumstantial evidence. You were asked if you had any objection against circumstantial evidence, and you all said that you did not have.

You take the testimony in this case up to the time of 3:30—between 3 and 3:30, or whatever time these two ladies, [fol. 626] Mrs. Massey and her daughter, put Mrs. Blauvelt as coming into the apartment; that testimony was direct evidence. The testimony of Mrs. May and the gentleman downstairs, as to what they heard; that is direct evidence. You take it up to when the officers came in there—even before they came in there—when Mrs. Vandiver and Mrs. Massey came up there and saw what they testified they saw; that is direct evidence; and from there on.

With reference to the fingerprints, I say that is real, tangible evidence.

Just supposing, for example, that Mrs. May, the lady that lived across the hall, had on some occasion on this date, the 24th, say on the occasion that this defendant left the premises, come out of the door and saw a fleeting glance or glimpse of this defendant leaving, and she would come in here and testify with reference to her possible identification of this man. You have to take the conditions under which she identified him. And assume from the evidence in this case—we can properly assume it—she never knew the man before, she never had seen him before—she was in a different category from Mrs. Turner, who saw him down there in the Colony Club, had seen him at previous times, knew the man, was acquainted with him—if she just had a fleeting glimpse and she came in here and said the man looked similar, or she was positive as to his identification, counsel would cross examine, and correctly so, “How much [fol. 627] time elapsed from the time you first saw him?” “I don’t remember the time.” “How was he dressed?” “I don’t know.” “What size was he?” “I don’t know.”

We can go further than that and suppose that the Masseys had seen someone going out that back door. I wouldn’t trade that testimony for those fingerprints. I say those fingerprints are better than an identification by an individual. You know and I know that individuals can be mistaken in identity. It all depends on the conditions under which they see them, and how long they are with them, the individual that is testifying.

For example, if there is a case which is prosecuted in court, for example, a robbery case, there may be ten robberies before we can get someone that is able, out of ten people, to identify the man. You eliminate a lot of them there. But you cannot get away from these fingerprints. There is not one of them. There are one, two, three, four, five, and one in the back is six. And they are still right there on the door.

I do not know, but maybe Providence had something to do with this case. We know Our Maker, in His infinite wisdom, gave us all something that was different. He fingerprinted us. Those fingerprints were left on that door just as a beacon light would be left searching for someone. Those fingerprints were pointing to one man, the defendant. He was there. He did it. That is what those [fol. 628] prints tell us.

The Court: We will take a recess at this time. The jury will keep in mind that you are not to talk about the case or form or express an opinion.

(Recess.)

The Court: The record will show the jury, counsel and the defendant present. You may proceed.

Mr. Roll: I have said all I desire to say about fingerprints, in my opening argument to you. I will now pass to another little phase of the case which I think some of the physical evidence indicates.

You recall the testimony of the landlady and her daughter with reference to seeing her at the time she came into the apartment; you remember the landlady said she was working around the linen closet or near the vicinity there, and they both told you that she was attired in a blue coat. We find from the photographs there that the coat that she had on—one lady described it as smart in appearance, the coat she had on. We further find from these two ladies she was carrying some packages at the time she came in. We find from the photograph which has been marked People's Exhibit 11 and from the testimony of the police officers that the packages are there, one in the chair, one on the seat. My recollection of the testimony concerning the contents of those packages, particularly one of them, was some corn in one, and I believe the [fol. 629] officer said butter and a can of something in the other. From those physical facts we can deduct that Mrs. Blauvelt would be met right at the door; she did not have an opportunity to get very far in the apartment; this thing happened simultaneously with her being right there at the entrance to the apartment. We find the packages are not in the kitchen. This thing happened quickly. We find the purse is open, the small coin purse is open. We find that the rings are gone. All of those physical facts with reference to the packages indicate that this attack occurred on her simultaneously with her coming into the door. That is a reasonable deduction from the testimony.

Now, let us pass to the testimony of Mr. Brennan, who testified here as to the conversations he had with the defendant. He testified yesterday, but I am going to read to you some of that testimony. You recall Mr. Brennan testified where he first saw the defendant, about talking to the defendant and asking him where he lived, about giving

him one address and then he gave another address, and he finally located, after a few days, the correct address of the defendant. He testified that on the 24th, I believe it was, of August, that this defendant, himself and Mr. Wiseman were in an automobile, and they were in the vicinity of Eighth and Catalina. At page 447 Mr. Brennan says, in response to this question: "Q—What happened when you got at Eighth and Catalina? A—At Eighth and Catalina I [fol. 630] stated to the defendant, I said, 'Have you ever been on this street? Are you acquainted on this street?' He said, 'What street is this?' I said, 'This is Eighth and Catalina.' I said, 'I am speaking about the apartment house at 744 South Catalina. Was you over at that apartment house?' He said, 'I wasn't.' Sgt. Wiseman further asked him if he had ever worked there as a janitor or had any acquaintance there, and he said he had not, that he had never been on that street, nor had he ever been on Catalina Street. I further asked him if—if on his way—if he lived on the east side, I said, 'If on your way to Beverly Hills to work, didn't you have occasion to cross Catalina Street?' 'Well,' he said, 'I might have crossed it but,' he said, 'if I did, I don't know.'"

The officer then testified that they went down to the other address, 855 East 28th Street, Mr. Wiseman got out of the car, and he had some conversation about the half brother or some relative by the name of Rose, who died and was buried from the People's Funeral Parlor, and a conversation with reference to other matters, and said then, when he got back to the station, the defendant with reference to telling about the funeral parlor, made this statement to him, reading from page 449: " 'I made one mistake. I told you my brother—my stepbrother's name,' and he said, 'You will go to the funeral parlors and find out all about my relations, anyway, so I might just as well [fol. 631] tell you the fact,' but he didn't tell us where he lived—he didn't tell us where he lived nor did he tell us where his relations lived. Then we went up stairs into the Detective Bureau, and at that time I asked the defendant if he was ready to tell us the whole story, and he said, 'I haven't got anything to say,' so I then told him that in the apartment at 744 South Catalina that we had found fingerprints in the apartment that corresponded with his, and that they were his fingerprints and he must have put them there if they were his prints. 'Well,' he said, 'I never

was in that apartment, and they are not my prints, and if they correspond to my prints somebody else put them there, because I was not in that apartment.' I said to him, I said, 'Well, you must have been in the apartment because there isn't anyone else could put your prints in there but yourself and,' I said 'they are definitely your prints.' He said, 'No, they are not my prints, because,' he said, 'if they look like mine,' he said, 'somebody else put them there.' I then went over and got the door, I think it is People's Exhibit 6— Q—6, the one here in evidence. A—People's Exhibit 6 in evidence, and I took the door out of my locker and I took the door and I sat it down in front of him, and I pointed out the prints to him on the door, and I said, 'Those are your prints,' and he said, 'No, they are not my prints at all.' I set the door down, and at this time Sgt. Wiseman showed the defendant the picture—I [fol. 632] know it is in evidence but I don't know what number it is, it is a picture of the kitchen showing the garbage disposal door. Q—I presume it was a smaller size than the one introduced in evidence here? A—It is a small picture; not the enlarged picture, but a small one. Q—A smaller size of People's Exhibit No. 18, is that correct, this one here? A—That is correct. This picture here, Sgt. Wiseman showed this picture to the defendant and pointed out this garbage disposal door here, and he said, 'That is how you got into that apartment, you went through the garbage disposal door, that is how you got into the apartment to burglarize it.' He said, 'Well, that is not so, I was not in the apartment.' The defendant said, 'Well, when was this murder, anyway?' 'Well,' I said, 'you should know that better than anybody else,' I said, 'you was present.' He said, 'I was not', that was his answer."

He goes on and describes about showing the defendant pictures of Mrs. Blauvelt and asking him if he had ever seen her before, and the defendant refused to look at them. This is page 452. "I said, 'What's the matter, can't you stand it?' He said, 'I don't like to look at dead people.' That was his answer to it. Q—You started to say he asked something about what day it happened on. Did you tell him when it happened? A—Yes, Sgt. Wiseman said, after I had said to him, 'Well, you should know,' Sgt. Wiseman [fol. 633] then spoke up and he said, 'Well, as far as we can figure it out, it happened on July 24th some time in the afternoon.' The defendant says, 'Well, what day was

that?" Sgt. Wiseman said; 'That is on a Monday.' 'Well,' he said, 'I don't have to worry about Monday,' he said, 'because I will have my witnesses,' he says, 'and I can account for my Mondays,' he said, 'all summer, I know where I was, and when the time comes I will have my witnesses here to prove it.' "

Now, going over further, to age 458, we find this conversation transpires, I believe, on the date shown you: "Q—Did you have some conversation with him on the date of the 28th? A—We got him that morning, picked him up at the Central police station and brought him to Division 4. After he was arraigned in Division 4, on the way back to the elevators to take him upstairs to book him in to the County, the defendant stated—I said, 'Well,' I said, 'Dewey, you have to go stand trial for this anyway,' and he said, 'Well, that is all right.' He said, 'I will have my attorney and all my alibi witnesses there when the time comes.' "

What has happened? In one answer there he asks what day this happened on. The officer says, "You know what day it happened on." He replied it happened on the 24th, and he wants to know what day of the week it is, and he told him it was Monday. He said, "I know where I was Monday. [fol. 634] I will have my witnesses and I can prove it." Again he says, "I will have my attorney and all my alibi witnesses there when the time comes." Have you heard from the lips of the defendant or a single witness called by the defendant where he was other than in that apartment? If he had alibi witnesses that would testify, they would be up here testifying.

Counsel asked this question: "The defendant may or may not take the stand"—you remember that—"In the event he does not take the stand, will you view that in the light of the presumption of innocence?" You were asked this question by myself: If the court instructs you that you can consider the fact of the failure of the defendant to take the stand, his failure to explain or deny anything, if you would do that, and you said you would. Now, the defendant does not have to take the stand in any case. He didn't take it here. He did not call, however, any witnesses. He tells the officers, "I will have my alibi witnesses." Where are they? Where are they? You know what stopped him. Those fingerprints; those fingerprints. Not one single witness did they call to the stand. You heard yesterday, "The People rest," and the defendant said, "The defense

rests." I say, why didn't they have them? The reason is, fingerprints; powerful evidence. So far as this defendant is concerned, as I said before, he does not have to take the stand. But it would take about twenty or fifty horses to [fol. 635] keep someone off the stand if he was not afraid. He does not tell you. No. Now, one more thing and I will conclude.

You were advised by the court in his questions to you and by counsel, with reference to the question of penalty. Now, with reference to the question of penalty, the court will instruct you that that is a matter entirely for your determination, and it is just exactly that. There are types of first degree murder where the evidence clearly warrants the imposition of a life imprisonment penalty. You can clearly think back over what you have read in the papers and what you have heard with reference to certain types of cases where that is a proper verdict. There is no question about that. There are certain circumstances in mitigation; a killing occurs, say, in a fit of anger, or something like that, sudden provocation. That is one situation. But in determining this question of penalty, in determining whether or not you should give this defendant any mercy, I ask you to see from this evidence, from these photographs that we have put here in evidence, from this strangulation, this death by torture, this death that occurred during the perpetration of a burglary, how much mercy this defendant gave the deceased, Mrs. Blauvelt; and I ask you to give to him just exactly the same amount of mercy that he gave to Mrs. Blauvelt. I ask that, realizing that it is entirely for you to determine, and I want you to consider it and [fol. 636] consider it carefully.

In conclusion I will say that from the evidence in this case, presented here in court, and based solely on it, the defendant is guilty of murder and guilty of murder in the first degree.

I thank you for your kind and courteous attention during this entire trial, during my argument to you, and at the proper time I ask you to go out and do your duty, and have the moral courage to bring in the proper verdict.

The Court: You may proceed, Mr. Safier.

(Argument by Mr. Safier.)

The Court: We will take our recess at this time. Keep in mind the admonition heretofore given, not to talk about

the case or form or express any opinion. Return here at 1:45.

(Whereupon an adjournment was taken until 1:45 o'clock of the same day, Tuesday, November 21, 1944.)

[fol. 637] Tuesday, November 21, 1944; 1:45 o'clock P. M.

The Court: The record will show the jury; the defendant and counsel present. You may proceed.

(Argument by Mr. Safier.)

Mr. Roll: Ladies and gentlemen of the jury; I am going to take up some statements made by counsel here in his argument to you. I was making notes as we went along.

Counsel, in starting out, tells you about the presumption of innocence and the doctrines of reasonable doubt. He says that the defendant is clothed with the presumption of innocence. In so far as that statement is concerned, that is true. And the court will give you an instruction on the doctrine of reasonable doubt. I asked you at the time you were sworn in here to be jurors in the case—at the time you were answering questions, to take that instruction by its four corners, the whole of it, and consider the whole thing. I will say—this is a proper comment to make on it—that part of it which says if you have an abiding conviction of the truth of the charge you find the defendant guilty. Reasonable doubt is not a possible doubt or imaginary doubt, because everything relating to human affairs is subject to some imaginary or possible doubt. So I ask you to take that instruction in its entirety when you consider it and weigh it. It is true that not only this defendant but every [fol. 638] defendant is presumed to be innocent, and the doctrine of reasonable doubt applies; it applies at all stages of the case; starting with the time of arrest, the matter is brought down to the District Attorney's office, a complaint is filed and then it goes through a preliminary hearing, an information is filed, it goes through that, and comes up for trial in the Superior Court. And here we started out in this case with the defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's

case, when he did not take the stand or did not put any witnesses on the stand, he stood here with that presumption removed, based on the evidence in this case.

Counsel comments on People's Exhibit No. 34. I said in my opening argument—I asked you to examine it—he said it was brought here for the purpose of inflaming you, prejudicing you against this defendant. That is not a true, is not a correct statement, and I challenge that statement. You recall when Mr. Brennan was on the stand I had him testify as to the condition of her garments, and that picture was brought here for the purpose of showing particularly the condition of the undergarment and the torn place in the undergarment, which you can see in the picture. And I want you to look at it for that purpose. You as [fol. 639] jurors have a right to see how the body of Mrs. Blauvelt was left there.

Counsel, in his argument to you, says—he used the words, “There are a lot of mysterious things in this case.” We have placed here, from the prosecution's standpoint, to use a slang expression, our cards on the table. We have brought exhibits in here, we have brought photographs in here, we have brought witnesses in here, we have shown you what our side of the case is. You have seen it. If there is any mystery that has occurred in this case, it is a mystery from the defense side of this case. Did the defense clear up any mystery? The answer to that is “No.”

Counsel comments on Mrs. Massey and on Miss Massey. We know from the testimony there in the record—counsel says that Miss Massey was out in the back yard that day. Well, the transcript indicates that she was in the basement in the morning washing, and that she did go out in the back yard on several occasions to hang clothes on the line; she was back and forth. That is in the morning. We also found out that she had her lunch with her mother up in the apartment. Naturally, they could not see everybody that came in and out of the apartment.

Then he talks about Mr. Frick. I just looked at the transcript when he was arguing. I could read it to you, but I am not going to take the time to do it. But Mr. Frick testified on the 24th, and he even gave you the apartment [fol. 640] number—on the morning of the 24th he was in an apartment on the fourth floor around 9 o'clock in the morning for approximately forty-five minutes using a vacuum cleaner. You recall the testimony. I asked him

the type of vacuum cleaner and he said it was a Hoover vacuum cleaner. I asked if it was a large or small one and he gave you the answer to that, and I asked him with reference to the noise. That is the testimony in this case concerning those individuals and where they were.

Now, counsel asked you with reference to the watch; why these diamonds were missing and why wasn't the watch taken? Some of you ladies have diamonds, and probably have had them for a long time, but unless they are of an unusual nature, of such a type that they are easily describable—I have in the past known of some cases where a diamond expert has been put on the stand, given an unusual stone, one which is marked in catalogues, and they can with their instruments positively identify it. But you take an ordinary carat or carat and a half diamond that you get out of a setting, you, I nor no one else could ever identify that stone. That is one of the reasons that diamonds are easily disposed of by people who sell them.

We come to a watch. A watch is something different; somewhere on a watch is a number. Sure, they change the cases. But you look at your own watch, if you have a watch on here now, and you will see it not only has one [fol. 641] number, it has got numbers on the outside and numbers on the inside. It is much easier to peddle diamonds removed from a setting than it is a watch.

Counsel comments upon the testimony of Mrs. Vandiver, criticized her for not seeing the packages there. But place yourselves in the position of those two ladies, Mrs. Vandiver and Mrs. Massey, who came in there, went to that apartment there. Well, the photograph here of the room indicates the light is just inside the door, just around the corner. Their particular attention, as well as anyone's attention that went in there, would be directed merely to one object, and that is the person on the floor. Those women, unquestionably, were frightened. We know they never went back to the apartment. Even when the police came they gave them the passkey to the apartment to get in there. There is an answer in Mrs. Vandiver's testimony to the effect that her particular attention was directed to that.

Counsel wants to know what the napkin is doing in this case. You will recall, when the photograph was introduced here in evidence, it showed—and it is here; you can look at it—it showed under the shoes a napkin. He starts out

wanting to know what that object was and who put it there. Mr. Pinker was called to the stand to identify the napkin. We find that the napkin was under the shoes. That is what this object was. He is the one that brought [fol. 642] it up; I did not bring it up. He wanted to know what that object there was, and we showed it to him.

Counsel says he does not know who crawled through the disposal unit, and he made some other statements that were rather extraordinary in his argument. He even went so far as to say he did not want to touch that door, "because I might leave my prints on it," and then says, "I don't know whether it was taken off by some police officers or not." I say to you, members of the jury, that that statement was not justified by the evidence in this case; it is not borne out by the evidence in this case, and that it is not a fair statement to make from the facts in this case.

We know at the time Mr. Long got there where the door was. He testified where it was. We know when the fingerprint man got there where the door was. We know he was the one that put newspapers under it, and then counsel says he does not know whether the police officers moved that door or not. I think you know and I know from the evidence in this case that the defendant crawled in that apartment through that garbage disposal unit.

Then counsel says, if the defendant wasn't there, what has he got to tell you? He says, "If he wasn't there, what has he got to tell you? Well, there are a lot of things he could tell us. If he wasn't there, where was he? Where was he? Was he by himself or was he with somebody? Where are these alibi witnesses he talked about? He could [fol. 643] explain how his prints got on there, and he could explain what he was trying to do when he was selling or attempting to sell a diamond ring. He could have done that. Neither he nor witnesses did it. Those are matters which all have been testified to and are here in this case."

Now, counsel goes into some detail with reference to the testimony of Mr. Frick, and I commented on that a little while ago. He thought it funny Mr. Frick couldn't tell where the other garbage cans were. Counsel got one answer on cross examination—he said, "I will take you out and show you." You remember that. "I will take you out and show you."

Counsel wants to know why Osmon was here. He said, "I don't know what they brought him in here for." Let

us look at the testimony of Mrs. Vandiver, Volume 3, page 140, cross examination by defense counsel: "Q. Were you home on July 24th? A. I was. Q. All day? A. Practically. Q. Had you seen any peddlers in the building on July 24th? A. Any what? Q. Peddlers. A. I don't know whether you would call a solicitor for a newspaper a peddler or not, but one came to my door Tuesday night. Q. Soliciting newspapers? A. Los Angeles Examiner. Q. You say on Tuesday night— A. Yes. Q.—or Monday night? A. Tuesday. Q. I am referring to Monday, the 24th. A. Oh, no, not Monday. Q. You did not see anybody on Monday? A. No. Q. You did not see anybody soliciting for the news- [fol. 644] paper on Monday? A. No. Q. Now, this boy that came to solicit for the papers, was he a stranger to you? A. He was. Q. And you now say that that was on Tuesday? A. Yes. Q. Now, you remember testifying in this matter at the preliminary hearing, do you not? A. I do."

Then counsel takes the transcript here, lets her read it, and then reads it out loud. "Q. I will ask you to read your testimony on page 14, lines 24 to 26. Will you just read that to yourself? Have you read this, Mrs. Vandiver? A. Yes. Q. I will ask you if this question was asked you and if you gave this answer: 'Q. Do you have any peddlers call at the apartment? A. Well, Monday night I had a young boy soliciting for the paper, but that is all. Was that question asked of you and did you give that answer? A. Evidently I did.'"

I again say that that is a straw that was thrown in here to cast suspicion away from this defendant. We brought the young boy in here and put him on the stand so you could see him. Counsel wants to know what he was in here for. She was cross examined before he was ever brought in on that subject. He is the one that brought it up. That is the reason Mr. Osmon was brought in here. We were putting our cards on the table so you jurors could see them.

Now, counsel criticizes Mr. Ferguson with reference to several matters. In one breath he says he does not know [fol. 645] whether the prints were on the door out there or not, and in the second breath he says Mr. Ferguson dusted the door and the glasses and the articles of furniture there in the front room, and that he did not try for any prints on the doorknob. Well, you heard the fingerprint man here testify in order to get fairly clear prints you have to

have a fairly clean surface; that you cannot get prints that are of any value off of one where there are other prints on them, others superimposed. Take the doorknob there, like the one right there on the door. I think I know enough from the fingerprint testimony that I heard here in the record that if you would try to get a print off that doorknob right now you could not do it. There is no use trying to do the impossible. He got prints, he got six prints, and he got them out there at the time.

Mr. Safer: Mr. Roll, I don't like to interrupt you, but I don't believe I said anything about the doorknob.

The Court: You mentioned the door.

Mr. Roll: You mentioned the door.

The Court: Without specifying what part of the door, and doors and doorknobs. When you refer to the entire door you mean all parts of it. I think the argument is permissible.

Mr. Roll: In reference to this statement made by counsel—he said, “I don't know the significance of the rings.” “I don't know.” Well, I think you know and I [fol. 646] know the significance of the rings. Counsel has been sitting here during this trial, and he has heard these various people testify that this lady wore the rings. He said he does not know the significance of the testimony of Mrs. Turner, the lady that was from the bookstore at Bullock's. He didn't know what she was brought in here to prove. She was brought in to prove at 11:45 the same day that Mrs. Blauvelt was killed, she was wearing these diamond rings. We put them on her person at that time. And that is what these other people were brought in here for, to show ownership, possession and custom in wearing them, and to show that when she was found that the rings were missing.

Now, counsel comments on the testimony of Mrs. Turner. He makes this statement: “I do not know whether she was in condition to know what the conversation was. She said she had had five drinks of beer.” Let us see what the testimony is in the case: “Q. And you were sitting at the bar, were you? A. Yes, sir. Q. Were you drinking? A. I had a few glasses of beer but I had not even been served beer at the time that I heard the conversation. I had just come in.”

Now, is that a fair statement to make in reference to the lady, when he says, “I don't know whether she was in

condition to know what the conversation was"? And then counsel goes on to say she did not know how he was dressed, [fol. 647] and he mentioned a mustache, and then went on to read the testimony, but he did not read one question which was, I think, quite pertinent. "Q. Are you able to say as to that particular evening that you had that conversation whether Mr. Adamson was wearing a mustache or not? A. He probably was. I can remember that he has had a mustache."

Then he read this question: "The Court: Can you tell, looking at him now, whether he has a mustache from where you are looking at him? A. I really never observed the man enough; I was never interested."

Counsel does not read this one to you: "The Court: Look at him right now and tell me whether he has a mustache right now or not. A. It doesn't look like it from here."

I may be getting bald-headed, but I still, fortunately, have good vision. I have what is known as 20-20 vision, and I would have to look quite closely at the defendant to determine whether or not he had a mustache. Some people call things mustaches when they are not. I think, maybe, I can qualify as an expert on mustaches.

Now, coming to the question of fingerprints. Counsel did not spend a great deal of time on the fingerprints. He made several comments. He said both of the men who testified concerning the fingerprints are police officers. Well, is there anything wrong with being a police officer? One [fol. 648] of these men was appointed as the court's expert. Did counsel dispute those fingerprints? Did he bring in his own experts? If he was not satisfied with those men he could bring in his own; ask the court to appoint somebody else. He knows as well as you know and I know that in so far as any reputable expert is concerned, there would not be any disagreement with reference to these fingerprints. There are six of them there. They were given careful consideration. If you remember Mr. Rogers' testimony, he even went so far as to say that when a fingerprint man was going to testify in court it was not the individual judgment of that fingerprint man but they brought somebody else to look at it and check their work. That is how careful they are. I have seen witnesses go on the stand before, not only experts but other people, where they have been asked the question, "Have you ever made a mistake?" Well, there is

no human living being that has not made a mistake at some time or another. Counsel probably has got an eraser on the end of his pencil right there; that is the reason they make erasers, because we make mistakes. That was an honest and that was a true answer when those gentlemen said that they had made mistakes. But there wasn't any mistake made in this case.

Counsel says that he could not see the similarity when Mr. Rogers was testifying. Well, I ask you, as just ordinary lay people, to take these enlarged prints, follow [fol. 649] through all the points of identity, bearing in mind the testimony here, and I believe that you will come to exactly the same conclusion that Mr. Rogers did, and Mr. Larbaig did, that conclusion being the prints on the door are the prints of the defendant.

Counsel said, after discussing the testimony of those two gentlemen, that there were two opportunities for the defendant to have placed the prints on the door: One, at the station; two, at the trial here. Then he follows it up by saying that if there are two reasonable interpretations to be placed on the evidence, two reasonable interpretations to be placed on the evidence, one pointing to guilty and one pointing to innocence, you are to adopt the one pointing to innocence. But he does not tell you that that particular rule only applies when there are two reasonable interpretations. So, let us take what he says and apply that as he wants us to apply it, to the fingerprints on the door. Is it a reasonable interpretation of this evidence because the defendant may have had an opportunity to place his fingerprints on the door, to say that those fingerprints were placed on the door by the defendant there at the preliminary hearing when Mr. Wiseman and Mr. Brennan were talking to him? Now, the defendant does not say, from the witness stand here, "I put my prints on the door there at the preliminary"; and he does not say, "I put my prints on there at [fol. 650] the police station." And in making that statement he asked you to utterly disregard the testimony of the officer who took the prints out there at the scene. So, I accept his challenge to us and say: Do apply that rule and you will find there is a reasonable interpretation and an unreasonable one. The reasonable one points to guilt.

The Court: I think we will take our recess, Mr. Roll. It is apparent we cannot conclude shortly. We will take

a little recess at this time. Keep in mind not to talk about the case or form or express any opinion.

(Recess.)

The Court: The record will show the jury, counsel and the defendant present. You may proceed.

Mr. Roll: Going back to the testimony of the experts concerning the fingerprints on the door. You will recall the testimony of Mr. Ferguson. We placed in evidence here what he called lift prints. Now, taking all of counsel's argument, he has not explained the lift prints which Mr. Ferguson says that he took there at the scene. Another thing, we find from the testimony of Mr. Ferguson that he put this Scotch tape over those prints out there at the time for the purpose of preserving them, and they were there on that door then and they are on the door at the present time with that Scotch tape on there. I do not know how you could put those prints on there in the location they are.

Now, with reference to the testimony of Mr. Larbaig and [fol. 651] Mr. Rogers. If there was ever any evidence of any case in the Superior Court where they have testified, where there was any mistake made, any dispute concerning their testimony, counsel would have had that record here in court and cross examined about it. He had nothing, nothing whatsoever, concerning it here in this case. Their testimony is here in the record undisputed.

Counsel talks about the testimony of Mrs. May with reference to the time—I am going to read it to you. This is from page 319, cross examination: "Q. Can you give us an approximation of the time that elapsed between the time you heard the key in the lock and the door close and the footsteps? A. No, I cannot; I haven't any idea what time elapsed. Q. Well, would it be a matter of five or ten minutes, or a matter of an hour or two hours? A. I don't know; I don't remember."

I cannot see how you could fix any definite time when her testimony throughout the entire transcript was along that situation, so far as time is concerned. We know this from the testimony of Mrs. May, that she said, "What do you want of me?" That voice that was described as a strained and frightened voice, in the testimony here. Unquestionably, in close proximity to the door, she was grabbed. What happened to the key, whether she had got the key out of

the lock, I don't know. They key, after the door shut, may have remained in the lock. The defendant may have [fol. 652] gone out later and taken the key out of the lock. It may have been the sound that the witness heard of the key coming out of the lock and the defendant after that going down the stairs.

Counsel says that there is one other point that I neglected to mention with reference to the prints, when counsel tells of the probability or possibility of the defendant having touched the door afterwards. Well, look at it from the standpoint of reason. In the first place, the defendant is told by the officers that this is the door, these are his prints on the door. The testimony in this case is uncontradicted. Do you think he would be silly enough, foolish enough, to go ahead and handle that door, when he knew from what the officers had told him, that that door and those prints were going to be used against him? Does that seem reasonable?

Counsel says to you that the defendant was not lying to Mr. Brennan. Mr. Brennan said—I read you his testimony this morning, and I won't read it again—but he testified that on this date of the 24th of August he and Mr. Wiseman were in the car and they came to Eighth and Catalina, and the defendant was asked if he had ever been in the apartment at 744 South Catalina Street, and the defendant said, "No, I have never been in that apartment." Mr. Wiseman asked him if he had ever worked there, and he said, "No, I have never worked there." Now, we know [fol. 653] from the fingerprints that he certainly was not telling the truth when he made that statement. Counsel says that he told the truth when he said that he may have passed Eighth and Catalina. Well, do you recall that Mr. Brennan said that one of the addresses the defendant gave was 914 North Beverly, and in this conversation he asked him if he may not have passed across Catalina Street in going to 911 North Beverly Drive and the defendant said, "Yes, I might have." Now, that is the way that situation came in. I say that he did not tell Mr. Brennan the truth when the opportunity was presented to him, when he was told that his prints were on the door. You recall what I read to you this morning, what the testimony was.

You recall in your examination as jurors that counsel was asking some questions with reference to whether or not

the defendant would or would not testify. Some place along the line there there was an objection made and the court said, "If you will reframe your question so that you place it in the position of a determination of whether he should or should not testify, the question would be proper." The question was reframed and you were all permitted to answer. I think you all remember that.

Now, counsel tries to lift from the defendant and place on himself the reason for the defendant not getting on the stand. He says, "Put the blame on me." That is what he told you. Well, I again repeat the statement I made this [fol. 654] morning: that this defendant had the right to take the witness stand; it is a privilege afforded to him, and he did not do it. You can consider that with all the testimony in this case, and I ask you to consider it.

In conclusion, I am going to just make this one statement to you: Counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, "I am not guilty"? Not one word from him, and not one word from a single witness. I leave the case in your hands.

[fol. 655] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 656] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

JUDGE'S CERTIFICATE

I, Charles W. Fricke, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, and being the judge who presided at the trial of the above entitled criminal cause, do hereby certify that the objections made to the supplemental transcript herein have been heard and determined and the same is now corrected in accordance with such determination, within the time allowed by law; and the same is now, therefore, approved by me this 30th day of April, 1944.

Chas. W. Fricke, Trial Judge.

[fol. 657] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

JUDGE'S CERTIFICATE

I, Charles W. Fricke, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, and being the judge who presided at the trial of the above entitled criminal cause, do hereby certify that no objection has been made to the within supplemental transcript by either the defendant or his attorney, or the District Attorney, within the time allowed by law; and the same is now, therefore, approved by me this 30 day of April, 1945.

Chas. W. Fricke, Trial Judge.

[fol. 658] Due service of the within and receipt of a copy hereby admitted this 17th day of April, 1945.

Fred N. Howser, District Attorney, by James Gibbons, Deputy, Attorney for Plaintiff and Respondent.

Due service of the within and receipt of a copy hereby admitted this 6 day of April, 1945.

Morris Lavine, Milton B. Safier, by Milton B. Safier, Attorney for Defendant and Appellant.

Due service of the within and receipt of a copy hereby admitted this 2d day of May, 1945.

Robert W. Kenny, Attorney General, by Frank Richards, Deputy.

[Tol. 659]

[File endorsement omitted]

IN THE SUPREME COURT OF CALIFORNIA

In Bank

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and
Respondent,

VS.

ADMIRAL DEWEY ADAMSON, Defendant and Appellant

OPINION—Filed January 4, 1946

Defendant was charged with murder in count I of an information by the District Attorney of Los Angeles County; and in counts II, III, IV, and V, with four separate crimes of burglary. He pleaded not guilty and was tried before a jury on counts I and II. He was tried in a separate consolidated case on counts III, IV, and V. He admitted two prior felony convictions and was adjudged an habitual criminal. The defendant did not testify and produced no witnesses. He was found guilty on count I of murder in the first degree, without recommendation, and guilty on count II of burglary in the first degree. This appeal is automatic from the judgment on count I (Penal Code, sec. 1239). Defendant also appeals from the judgment on the burglary count and from an order denying his motion for new trial.

The body of Stella Blauvelt, a widow 64 years of age, [Tol. 660] was found on the floor of her Los Angeles apartment on July 25, 1944. The evidence indicated that she died on the afternoon of the preceding day. The body was found with the face upward covered with two bloodstained pillows. A lamp cord was wrapped tightly around the neck three times and tied in a knot. The medical testimony was that death was caused by strangulation. Bruises on the face and hands indicated that the deceased had been severely beaten before her death.

The defendant does not contend that the evidence does not justify a finding that murder in the first degree had been committed. (Penal Code, sec. 189.) The sole contention of fact that he makes is that the evidence is not sufficient to identify him as the perpetrator. The strongest circumstance tending to so identify the defendant was the

Smudging of six fingerprints, each identified by expert testimony as that of the defendant, spread over the surface of the inner door to the garbage compartment of the kitchen of the deceased's apartment. (See 2 Wigmore, Evidence, 3rd ed. 389.) After the murder, this door was found unhinged, leaning against the kitchen sink. Counsel for defendant questioned witnesses as to the possibility of defendant's fingerprints being forged, but the record does not indicate that any evidence to that effect was uncovered. The theory of the prosecution was that the murderer gained his entrance through the garbage compartment, found the inner door thereof latched from the kitchen side, and forced the door from its hinges. It was established that defendant [fol. 661] could have entered through the garbage compartment by having a man about his size do so. The fact that the key to the apartment could not be found after search and the testimony of a neighboring tenant as to sounds heard indicate that the murderer left the apartment through the door thereof and made his exit from the building down a rear stairway.

The tops of three women's stockings identified as having been taken from defendant's room were admitted in evidence. One of the stocking tops was found on a dresser, the other two in a drawer of the dresser among other articles of apparel. The stocking parts were not all of the same color. At the end of each part, away from what was formerly the top of the stocking, a knot or knots were tied. When the body of the deceased was found, it did not have on any shoes or stockings. There was evidence that on the day of the murder deceased had been wearing stockings. The lower part of a silk stocking with the top part torn off was found lying on the floor under the body. No part of the other stocking was found. There were other stockings in the apartment, some hanging in the kitchen and some in drawers in a dressing alcove, but no other parts of stockings were found. None of the stocking tops from defendant's room matched with the bottom part of the stocking found under the body.

In reply to questions by the police, defendant denied that he resided or had ever been at the apartment house identified by testimony as his residence. At different times he gave two other addresses as his residence. When shown a [fol. 662] picture of the murdered victim, he refused to look at it, stating that he did not like to look at dead people.

The theory of the prosecution was that the motive of the murder was burglary. Testimony revealed that the deceased was in the habit of wearing rings with large-sized diamonds and that she was wearing them on the day of the murder. The rings were not on the body and search has failed to uncover them. A witness, positively identifying the defendant, testified that at some time between the 10th and 14th of August, 1944, she overheard defendant ask an unidentified person whether he was interested in buying a diamond ring.

From the foregoing evidence a reasonable jury could conclude that beyond a reasonable doubt defendant committed the murder and burglary. (See *People v. Ramirez*, 113 Cal. App. 204; 2 Wigmore, *supra*, 389.) Testimony that the screws were still in the hinges of the door when it was found and that fragments of wood that appeared to have come from the screw holes were clinging to them, indicating a forced removal, served to discount the possibilities that at some previous date the door had been taken from the apartment for some unknown reason and at that time handled by the defendant, or that defendant had handled the door during some earlier visit to the deceased's apartment. Testimony to the effect that the garbage pail was not in its customary place when found after the murder further tended to substantiate the prosecution's theory as to time and mode of entrance.

Defendant contends that error was committed in the admission of the testimony of part of a conversation in which he asked an unidentified person whether the latter was interested in purchasing a diamond ring. Conceding that this evidence, though hearsay, was admissible in so far as the hearsay rule is concerned as an admission (*People v. Ferdinand*, 194 Cal. 555, 568; *People v. Britton*, 6 Cal. 2d 10, 13; *People v. Chan Chaun*, 41 Cal. App. 2d 586, 593), defendant contends that it was irrelevant. The rule is well settled that a witness may testify to part of a conversation if that is all that he heard and it appears to be intelligible. (*People v. Luis*, 158 Cal. 185, 194; *People v. Ramos*, 3 Cal. 2d 269, 272; *People v. Tarbox*, 15 Cal. 57, 64; *People v. Daniels*, 105 Cal. 262, 285; *People v. Montgomery*, 47 Cal. App. 2d 1, 19.) *People v. Rabalete*, 28 Cal. App. 2d 480, 485, is not contrary to this rule. The fragment of the sentence there held inadmissible, "242 to

show", was held to create merely a suspicion of the meaning of the entire sentence. (People v. Jacquaino, 63 Cal. App. 2d 390, 393-4.) The part of the conversation here admitted, however, in view of the evidence indicating that the motive of the murderer was the theft of diamonds, tended to identify defendant as the perpetrator.

To be admissible, evidence must tend to prove a material issue in the light of human experience. (See 1 Wigmore, supra, 407.) The stocking tops found in defendant's room were relevant to identify defendant because their presence on his dresser and in a drawer thereof among other articles [fol. 664] of wearing apparel with a knot or knots tied in the end away from what was formerly the top of the stocking indicates that defendant had some use for women's stocking tops. This interest in women's stocking tops is a circumstance that tends to identify defendant as the person who removed the stockings from the victim and took away the top of one and the whole of the other. Although the presence of the stocking tops in defendant's room was not by itself sufficient to identify defendant as the criminal, it constituted a logical link in the chain of evidence. (People v. Graves, 137 Cal. App. 1; People v. Billings, 34 Cal. App. 549, 553.) Evidence that tends to throw light on a fact in dispute may be admitted. The weight to be given such evidence will be determined by the jury. (People v. Mooney, 177 Cal. 642, 655; People v. Graves, supra; People v. Billings, supra; see 7 McKinney's Dig. 54.) Codification of this rule as applied to demonstrative evidence is found in section 1954 of the Code of Civil Procedure: "Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury . . . The admission of such evidence must be regulated by the sound discretion of the court."

It is contended that the admission of the stocking tops deprived defendant of a fair trial and therefore denied him due process of law. Defendant states that their admission could serve no purpose except to create prejudice against [fol. 665] him as a Negro by the implication of a fetish or sexual degeneracy. No implication of either was made by the prosecutor in his brief treatment of the evidence in oral argument. Moreover, except in rare cases of abuse, demon-

strative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency. (People v. Antony, 146 Cal. 124; People v. Hawes, 98 Cal. 648; People v. Haydon, 18 Cal. App. 543; see People v. Colvin, 118 Cal. 349, 351; see People v. Bolton, 215 Cal. 12, 20; 8 Cal. Jur. 140 et seq; *ibid.* 76, sec. 177; 4 Wigmore, *supra*, 251, 254; 21 Mich. L. Rev. 935; 31 Yale L. J. 107.)

The prosecuting attorney commented repeatedly on the failure of the defendant to take the stand. By statute or by decision, the majority of jurisdictions prohibit such comment. (See 8 Wigmore, *supra*, 412; 31 Mich. L. Rev. 40.) In 1934, however, following studies made by the American Law Institute and the American Bar Association (9 Proc. Am. L. Inst. 202-218; 56 Reports A. B. A. 137-152), Article I, section 13 of the California Constitution was amended to provide that " . . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury" Similar provisions are found in section 1323 of the Penal Code. Article I, section 13 of the California Constitution also provides that "No person shall be . . . compelled, in any criminal case, to be a witness against himself" It is contended that this provision and the [fol. 666] 1934 amendment are inconsistent and that therefore both cannot be effective. Before the 1934 amendment, it was the rule in California that commenting on the defendant's failure to take the stand or advising the jury that it could draw inferences unfavorable to him on that account violated the privilege against self-incrimination. (People v. Tyler, 36 Cal. 522.) The 1934 amendment limited but did not abolish this privilege. A person still cannot be compelled in any criminal case "to be a witness against himself," but the privilege no longer extends so far as to prevent comment upon or consideration of his failure to explain or deny evidence against him. The practical effect of the 1934 amendment may be that many defendants who otherwise would not take the stand will feel compelled to do so to avoid the adverse effects of the comments and consideration authorized by the amendment. (See 26 Yale L. J. 464, 466.) Such a coercive effect, however, is sanctioned

by the amendment, which, being later in time, controls provisions adopted earlier.

It is contended that in so far as it limits the privilege against self-incrimination, the 1934 amendment to the Constitution and section 1323 of the Penal Code violate the due process clause of the Fourteenth Amendment to the United States Constitution. Although there has been much discussion as to the wisdom of allowing comment upon and consideration of a defendant's failure to deny or explain incriminating evidence (see 8 Wigmore, *supra*, 419; 31 Mich. L. Rev. 40; *Ibid*, 226; 22 Cornell L. Q. 392; 26 Yale [fol. 667] L. J. 464; 9 Proc. Am. L. Inst. 202-218; 56 Reports of A. B. A. 137-152 3 Jour. of Crim. Law and Criminology, 770; 13 *ibid*. 292; 26 *ibid*. 180), the freedom from federal constitutional limitations of state provisions allowing such comment and consideration was settled in *Twining v. New Jersey*, 211 U. S. 78. (See 31 Mich. L. Rev. 40, 45; *ibid*. at 228; 22 Cornell L. Q. 392, 393; 8 Wigmore, *supra*, 414, sec. 2272, n. 2.) In that case the defendant, who was convicted in the courts of New Jersey, had not testified in his own behalf. The trial court, in accordance with New Jersey decisions, commented on this fact. The court decided that such comment did not constitute a denial of due process, holding that the due process clause does not protect a person against self-incrimination. The fact that the comment in the *Twining* case was by the court rather than the prosecutor is immaterial. (*State v. Ferguson*, 226 Ia. 316; see 8 Wigmore, *supra*, 1943 Supp., 30.) *Twining v. New Jersey* also held that the privilege against self-incrimination is not protected by the privileges and immunities clause of the Fourteenth Amendment.

It is clear from the terms of the constitutional provision that the consideration and comment authorized relates, not to the defendant's failure to take the stand, but to "his failure to explain or deny by his testimony any evidence or facts in the case against him" whether he testifies or not. The constitutional provision thus makes applicable to criminal cases in which the defendant does not testify, the established rule that the failure to produce evidence that is within [fol. 668] the power of a party to produce does not affect in some indefinite manner the ultimate issues raised by the pleadings, but relates specifically to the unproduced evidence in question by indicating that this evidence would be adverse. (*State v. Callahan*, 76 N. J. L. 426; *State v. Sgro*,

180 N. J. L. 528; McDonald v. Smith, 139 Mich. 211, 224; Mooney v. Davis, 75 Mich. 188, 193; Harrison v. Harrison, 124 Ia. 525, 526; see Cal. C. C. P. secs. 1963 (5), 2061 (6), (7); 2 Wigmore, *supra*, 162; *ibid.* 176; *ibid.* 179.) "All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to contradict." (Mansfield, C. J. in Blatch v. Archer, Cowp. 66, see 2 Wigmore, *supra*, 162 et seq., and cases there cited. The Code of Civil Procedure codifies this rule by providing that the jury is to be instructed by the court on all proper occasions: "6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict;" (Code Civ. Proc., sec. 2061(6)), and that it is to be presumed "that evidence wilfully suppressed would be adverse if produced;" (*Ibid.* sec. 1963(5).) The basis in common experience for this rule as applied to criminal cases has been set forth in State v. Grebe, 17 Kan. 458: "The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever therefore a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists." Therefore the failure of the defendant to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. Respondent cites People v. Dukes, 16 Cal. App. 2d 105, 109-110; People v. Pianezzi, 42 Cal. App. 2d 265, 267, 269; and People v. Dozier, 35 Cal. App. 2d 49, 59-60, as holding that failure to testify directly affects the ultimate issue of guilt by raising an "inference or presumption of guilt." The instruction refused in the Dukes case was in part to the effect that the members of the jury were "not to consider or permit [themselves] in anywise to be influenced by the fact that the defendant has not seen fit to

offer himself as a witness before you." A similar instruction was refused in the Pianezzi case. The instruction refused in the Dozier case provided that failure to deny or explain testimony "should not create a prejudice or unfavorable inference in the minds of the jury; no inference can be drawn against the defendant from his failure to testify." In these cases the court was clearly correct in [fol. 670] holding that the instruction would destroy the effect of the 1934 amendment.

The failure of the accused to testify becomes significant because of the presence of evidence that he might "explain or deny by his testimony" (Art. I, sec. 13, Cal. Const.), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. (*State v. Grebe*, supra; *Mooney v. Davis*, supra, 193; see Code Civ. Proc., secs. 1963(5), (6), 2061 (6), (7).) No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge of the facts with respect to which evidence has been admitted against him, for it is not within his "power" (Code Civ. Proc., sec. 2061(6)) to explain or deny such evidence. (*Ibid.* sec. 1963(5); *Parker v. State*, 61 N. J. L. 308; *Caminetti v. United States*, 242 U. S. 470, 494, 495; *Blatch v. Archer*, supra; *R. v. Burdett*, 4 B. & Ald. 122; see *People v. Albertson*, 23 Cal. 2d 550, 585.)

It was never intended, of course, that the 1934 constitutional amendment should relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by admissible evidence supporting each element of the crime. (*People v. Sawaya*, 46 Cal. App. 2d 466, 471; *State v. Callahan*, supra; see Bruce, (One of the draftsmen of the American Bar Association resolution that preceded the adoption of the California provisions), *The Right to Comment on the Failure of the Defendant to Testify*, 31 Mich. L. Rev. 226, 229, 231; 2 *Wigmore*, supra, 179; 4 *Cleveland Bar Journal* 12; 3 *Jour. of Crim. Law and Criminology* 770, 774.) Nor can the defendant's silence be regarded [fol. 671] as a confession. In so far as *People v. Pianezzi*, 42 Cal. App. 2d 265, 268, holds that the prosecutor may properly characterize the defendant's failure to testify as tantamount to a confession, it is disapproved.

Of its own volition the trial court gave the following as the only instruction with respect to the right of the prosecution to comment on and of the jury to consider defend-

ant's failure to explain or deny the evidence against him: "It is the right of court and counsel to comment on the failure of defendant to explain or deny any evidence against him * * *; yet the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses." In stating merely that court and counsel may comment on defendant's failure to explain or deny incriminating evidence, the instruction encompasses a rule of concern solely to the court. Respondent cites *People v. McKenna*, 11 Cal. 2d 327, 336, and *People v. Boggs*, 12 Cal. 2d 27, 35, as upholding the instruction given. In the McKenna case, no comment was made on the failure of the defendant to testify, and it was held that an instruction in the general language of the Constitution was not prejudicial. The Boggs case likewise rested merely on the ground that the instruction there given was not prejudicial. The jury, however, is concerned with the scope and nature of the consideration that it may give defendant's failure to explain or deny incriminating evidence, and in the present case should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny; and that if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.

The failure to give such an instruction was not prejudicial, however. It appears from the evidence that defendant could reasonably be expected to explain or deny all evidence presented. Thus the jury could infer from the evidence concerning the fingerprints either that defendant handled the garbage compartment door in the perpetration of the burglary and murder or that they were placed there at some other time. The defendant could reasonably be expected to know whether or not he had handled the garbage door and if so, on what occasion. The evidence that he solicited someone to buy a diamond ring is susceptible of an inference either that he was attempting to sell the victim's rings or rings that had no connection

with the crime. The defendant could reasonably be expected to know whether or not he had done such soliciting and, if so, with regard to what rings. His failure to explain or deny this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable.

The defendant contends that the court erred in refusing the following proposed instructions: "You are instructed that it is the policy of the law to zealously protect the innocent. In a criminal case the law clothes the defendant [fol. 673] with a presumption of innocence and casts upon the people the burden of proving guilt beyond a reasonable doubt. The defendant is not obliged to prove his innocence or offer any proof thereon; and if the defendant elects not to take the witness stand but to rest upon what he believes to be the weakness or insufficiency of the People's case, he has a right to so do and no inference or presumption of guilt arises from his failure to take the witness stand." "You are instructed that the burden of proof rests on the prosecution and the failure of the defendant to take the stand raises no presumption or inference of guilt." There was no error in the refusal to give these instructions. The court gave ample general instructions elsewhere on the presumption of innocence and burden of proof. The bare statement, moreover, that "the failure of the defendant to take the stand raises no presumption or inference of guilt," is deficient and misleading in that it fails to point out what consideration can be given the circumstance. The court may properly refuse to give a proposed instruction that is misleading because it only partially states the law.

The following proposed instruction, however, should have been given: "You are instructed that the fact that the prosecutor has a right to comment on the failure of the defendant to take the stand does not relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt and by competent and legal evidence." Although a general instruction on burden of proof had been given, because of the likelihood of misconstruction of the weight and effect to be given the circumstance, the defendant was entitled to a specific instruction that failure to deny or [fol. 674, explain incriminating evidence does not impose upon him the burden of persuading the jury of his innocence.

In view, however, of the fact that the jury was instructed thoroughly on burden of proof generally, it is improbable that the verdict would have been different had the instruction been given.

The following instruction was also proposed: "You are instructed that the right of the prosecution to comment on the failure of the defendant to take the stand cannot be used to supply a failure of proof by the prosecution." Since the circumstance of the defendant's failure to testify serves only to assist the jury in determining the credibility of and the inference to be drawn from evidence that is capable of being but is not explained or denied by his testimony, where no such evidence is presented in support of an essential element of the crime, this circumstance clearly cannot alone support a finding on that element against the defendant. (People v. Sawaya, *supra*; State v. Callahan, *supra*; see 2 Wigmore, *supra*, 179; 26 Yale L. J. 464, 469; 31 Mich. L. Rev. 226, 229, 231; 4 Cleveland Bar Journal 12; 3 Jour. of Crim. Law and Criminology, *supra*.) Defendant was therefore entitled to an instruction that his failure to testify may not by itself support a finding against him on an essential element of the crime. The refusal to give the proposed instruction, however, was not prejudicial. Ample evidence supporting each element of the crime was presented. Moreover, the strength of the evidence against the defendant makes it improbable that the jury could have disbelieved all the positive evidence supporting any essential [fol. 675] element of the crimes charged, thereby leaving defendant's failure to testify the sole circumstance in support of that element.

Defendant contends that the rational connection between a fact proved and the fact presumed required by the due process clause of the Fourteenth Amendment (People v. Scott, 24 Cal. 2d 774, 779 and cases there cited; Tot v. United States, 319 U. S. 463, 467) does not exist between the failure to deny or explain incriminating evidence and the inference of the credibility and unfavorable tenor thereof that these provisions permit the jury to draw. Defendant argues that reasons other than lack of power to explain favorably to himself or to deny such evidence, for example fear of disclosure to the jury of prior crimes through impeachment (Code Civ., Proc., sec. 2051; see 3 Wigmore, *supra*, 538; *ibid* 380) or fear of creating a bad impression by being a "poor witness," may prompt a de-

fendant not take the stand. In view of the even poorer impression normally created by not taking the stand (State v. Grebe, *supra*; see Bruce, 31 Mich. L. Rev. 226, 229, 231; 8 Wigmore, *supra*, 410; *ibid.* 424; 3 Jour. of Crim. Law and Criminology, *supra*), fear of creating a bad impression because of being a "poor witness" is not an impressive explanation of a defendant's silence. (See 22 Cornell L. Q. 392, 395, et seq.; 13 Jour. of Crim. Law and Criminology, 292, 293.) It is true that defendants convicted of prior crimes often do not take the stand because of fear that upon cross-examination their criminal record will be given to the jury. (See Code Civ. Proc., sec. 2051; 22 Cornell L. Q., *supra*; 9 Proc. Am. L. Inst. 202, 204, 207; 56 Reports of A. B. A. 137, 142, 144; 13 Jour. of Crim. Law and Crimi- [fol. 676] nology, 292, 295.) Clearly, however, the inference authorized need not be the only plausible one that can be drawn from the proved fact, to be rational under the due process clause. The inference is rational if the proved fact is a warning signal according to the teachings of experience. (People v. Scott, 24 Cal. 2d 774, 780; Morrison v. California, 291 U. S. 82, 90.) It is common experience that the failure to explain or deny adverse evidence that a defendant may reasonably be expected to explain or deny tends to show the credibility of such evidence and renders more probable the unfavorable tenor thereof. (Code Civ. Proc., secs. 1963(5), 2051(6); State v. Grebe, *supra*; see 2 Wigmore, *supra*, 164 et seq.; 31 Mich. L. Rev. 226, 229.)

There has been much criticism of the present state of the law, which places a defendant who has been convicted of prior crimes in the dilemma of having to choose between not taking the stand to explain or deny the evidence against him thereby risking unfavorable inferences, and taking the stand and having his prior crimes disclosed to the jury on cross-examination. (See 22 Cornell L. Q. 392, 395; 31 Mich. L. Rev. 40; 9 Proc. Am. L. Inst., *supra*; 56 Reports of A. B. A., *supra*.) In the present case defendant admitted two prior felony convictions for which he served terms of imprisonment in the Missouri state prison. The fact of the commission of these crimes was not offered or introduced into evidence and would have been inadmissible under the general rule with respect to prior crimes. (People v. Albertson, 23 Cal. 2d 550, 576, and authorities there cited.) [fol. 677] Had defendant taken the stand, however, the commission of these crimes could have been revealed to the jury

on cross-examination to impeach his testimony. (Code Civ. Proc., sec. 2051; *People v. Braun*, 14 Cal. 2d 1; see 28 Calif. L. Rev. 222; 3 Wigmore, *supra*, 380.) Since fear of this result is a plausible explanation of his failure to take the stand to deny or explain evidence against him (see 22 Cornell L. Q. 392; 13 Jour. of Crim. Law and Criminology, 292, 295; 9 Proc. Am. L. Inst., *supra*; 56 Reports of A. B. A. *supra*), the inference of the credibility and unfavorable tenor of such evidence that arises from this failure is definitely weakened by this rule of impeachment. This weakness, however, could not be revealed to the jury by counsel or court without prejudicing the defendant through the revelation of past crimes. Court and prosecutor are left no alternative but to comment on defendant's failure to deny or explain evidence against him as though the sole reason for his silence was that he had no favorable explanation. Any change in the law in this respect, however, must be made by the Legislature.

The prosecutor commented seven times in oral argument on defendant's silence. Defendant did not object below to these comments. In the absence of such objection it is the general rule that misconduct of the district attorney cannot be urged on appeal. (*People v. King*, 13 Cal. 2d 521, 527; *People v. Boggs*, 12 Cal. 2d 27, 40; *People v. Hight*, 37 Cal. App. 2d 498, 501.) Moreover, in the majority of [fol. 678] instances these comments were properly limited to specific parts of the evidence that defendant could reasonably be expected to explain or deny. The prosecutor approached the borderline of permissible comment, however, when he closed his oral argument as follows: "In conclusion, I am going to just make this one statement to you: Counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty'? Not one word from him, and not one word from a single witness. I leave the case in your hands." This statement could be construed as a declaration that the jury should infer guilt solely from defendant's silence, and if defendant had objected thereto, he would have been entitled to have the jury advised that his silence could not be given such construction. It is improbable, however, that the jury was misled. The prosecutor's statement followed his review of the evidence and could be construed in connection therewith as a conclusion that although the evidence established guilt, the defendant failed to explain or deny

it. A major part of the testimony and of the prosecutor's oral argument concerned the presence of six of defendant's fingerprints on the garbage compartment door. Fingerprints are the strongest evidence of identity of a person and under the circumstances of the present case they were [fol. 679] alone sufficient to identify the defendant as the criminal. (People v. Ramirez, 113 Cal. App. 204.)

The judgments and the order denying a new trial are affirmed.

Traynor, J.

We concur: Gibson, C. J.; Shenk, J.; Edmonds, J.; Carter, J.; Schauer, J.; Spence, J.

[fol. 679a] [File endorsement omitted.]

[fol. 680] IN THE SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING—Filed January 18, 1946

The defendant was charged with the crime of murder by an information filed with the District Attorney of Los Angeles County. He was found guilty by a verdict which carried no recommendation and judgment of death was, therefore, pronounced.

He has appealed from the judgment of conviction of murder, and this Court on the 4th day of January, 1946, rendered judgment affirming his conviction. He now petitions for rehearing in this Court for the reasons to be given, and upon the following grounds:

I

The Decision of the Supreme Court of California Incorrectly Construes and Applies the California Constitutional Amendment in Holding That the Provisions Thereof Are Not in Violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 681]

II

The Court Errs in Holding That the Evidence Justifies the Verdict and Is Not Contrary to the Law and the Evidence.

III

The Court Errs in Holding That the Evidence in Support of the Judgment Is So Strong That It Is Improbable That But For Said Error the Jury Would Have Failed To Find the Defendant Guilty.

These grounds will be presented in the order above set forth.

I

The decision of the Supreme Court of California incorrectly construes and applies the California Constitutional Amendment in holding that the provisions thereof are not in violation of the Fourteenth Amendment to the Constitution of the United States.

The decision and opinion of this court regards Article I, Section 13 of the Constitution as not compelling the accused to testify, but merely allowing the court and counsel to comment upon his failure to explain or deny evidence against him and the jury to consider such failure.

The reasoning in *People v. Tyler*, 36 Cal. 522, applied to the present Section 13, shows in a realistic manner that the real effect of the provision is to coerce persons accused of crime to testify in their defense.

[fol. 682] The opinion cites "one of the draftsmen of the American Bar Association's Resolution which preceded the adoption of the California provisions", to the effect that the Constitutional provision was never intended to relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt.

Petitioner insists that good intentions cannot make an unconstitutional law valid, and that said provisions are so plain and free from ambiguity as to exclude their amendment by judicial interpretation.

No one will question the erudition of Mr. Bruce or his associates but this seems to be a superb example of exquisite folly, resulting from wisdom too finely spun.

It is believed that in holding that the California code and constitutional provision in question do not infringe due process under the decision in *Tot v. United States*, 319 U. S. 463, 87 L. Ed. 1519, this court has overlooked vital and necessary implications which should be given consideration.

In view of the utterly indefinite character of the provision in placing no limitation as to the effect to be given by proof of the basic fact it accords to the jury *carte blanche* in the matter of the weight to be attached to the defendants having stood mute. Therefore, he must convince the jurors of his innocence or his testimonial denial or explanation may be of no avail. There is no middle [fol. 683] ground to be characterized as "some evidence", or even as sufficient to "balance the scales."

(Paul Brausman, "The Statutory Presumption," 6 Tulane Law Review, p. 493.)

There are two special and novel factors which remove any possible fancied connection which might be conceived on that comparison alone.

These are, the manner by which it compels the defendant to rebut the People's case and the all-embracing scope which his testimony is required to cover.

1. The ultimate fact of guilt, which Article 4 Section 13, authorizes the jury to infer, pushes into oblivion whatever evidence the defendant may have offered, regardless of its weight and convincing force.

These provisions compel the defendant to testify by bludgeoning him with the alternative that if he fails to testify and explain the evidence against him, no matter how many witnesses the defense may have called, and regardless of the convincing character of the proof that he may have produced by such witnesses, merely because he personally does not testify, the jury may infer his guilt.

2. But an equally unreasonable factor and capricious element is that the defendant must not only take the stand and testify to facts of which he may have knowledge if he would avoid the risk of the jury's inferences from his failure to do so, but he must "explain or deny any evidence [fol. 684] or facts in the case against," whether or not he has any knowledge concerning such facts and has had no opportunity to acquire such knowledge.

The opinion herein holds that said provisions do not require the accused to explain or deny evidence against him as to which he cannot reasonably be expected to have knowledge and that if the jury is so instructed no harm to him can result.

However, the provisions contain no exception to justify this interpretation. The language is plain and all-inclusive, and any instruction to the contrary would violate that language.

The salient points in these constitutional and code enactments are:

1. The accused is given the option to testify or to remain mute.

2. The jury may "consider" the failure of the accused to testify.

3. Even if he testifies, the jury may "consider" his failure to "explain or deny" any item of fact or evidence tending to incriminate him.

4. The jury may consider such failure for any purpose and as bearing upon any issue or element in the case, including the ultimate question of guilt or innocence.

5. The defendant is required to go forward by his own testimony, after the People rest their case, at the risk [for 685] of being found guilty on the inference or presumption to be drawn from his failure to explain or deny.

6. Consideration of the defendant's failure to explain or deny facts or evidence against him is not limited to matters as to which it has been shown that he must have personal knowledge.

7. The defendant is required to go forward and rebut the People's evidence by his own testimony to avoid the inference or presumption of guilt, even though by other evidence he may have adequately explained or otherwise rebutted the plaintiff's case in part or as a whole.

Each of these outstanding consequences are inherent in the statutory and constitutional provision with which we are concerned, because of the all-embracing language which they employ and the absence of any limitation upon the weight to be accorded or the purposes for which the jury may regard the defendant's failure to take the stand and personally rebut the People's case against him.

The fact which may be presumed or inferred, namely, that the defendant is guilty, has no rational connection with the fact or circumstance from which it may be inferred or

presumed, to-wit, that he "failed to explain or deny by his testimony evidence or facts in the case against him."

The basis and guide for determining the verity of the assertion in the above caption is judicial knowledge. In the leading case, *Tot v. United States*, 319 U. S. 463, 87 [fol. 686] L. Ed. 1519, it is said that the test of the validity of a statutory presumption is that to be valid, there must be "a rational connection between the facts proved and the fact presumed," and that "where the inference is so stained as not to have a reasonable relation to the circumstances of life *as we know them* it is not competent for the legislature to create it as a rule governing the procedure of courts." (Emphasis added.)

The basic facts in the presumption or inference authorized by the instant constitutional and code provisions are: The accused has been charged with having committed a crime; evidence in some degree tending to support the charge has been introduced by the People; the defendant failed to testify and did not attempt to personally explain or overcome the evidence produced by the state.

The ultimate fact to be presumed or inferred is: The defendant is guilty.

In *People v. Brown*, 81 Cal. App. 226, 242, the special prosecutor made an argument to the effect that had the defendants dared to do so they would have testified and that the failure of the defendants to testify "loaned undying strength to our charge." This argument was condemned by the court of appeal and it said: "Such is often not the reason for one declining to take the stand when charged with a public offense."

On petition for hearing in the Supreme Court it was [fol. 687] said that a holding of the court of appeal respecting the admissibility of certain evidence to impeach a defense witness was erroneous, and the Supreme Court adds: "In all other respect, however, we are in accord with the decision of the District Court of Appeal."

There are several reasons other than consciousness of guilt and the consequent fear of cross-examination and impeachment.

The consideration of the entire situation as it occurs practically in all the courts of this state, is sufficient answer. Defendants *usually* take the witness stand unless they have had a previous conviction of a felony. It is not because they are guilty of the crime charged that they refuse

to take the stand, but because of the fact that they are subject to impeachment by reason of such prior conviction of a felony, and thus an issue can be placed before the jury which prejudices them and deprives the accused of a fair trial on the specific question of guilt or innocence of the charge with which they are faced.

Other reasons are set forth in appellant's briefs herein.

The Applicable Law

There are several decisions of the United States Supreme Court which have settled the law on this question but the case of *Tot v. United States*, 319 U. S. 463, only will be quoted since, it is believed, it will suffice for present [fol. 688] purposes.

Tot was charged with violation of the Federal Firearms Act which provided, "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearms or ammunition which has been shipped or transported interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

The Opinion states, "The Government's evidence was that Tot had been convicted of assault and battery in 1925, and had pleaded non vult to a charge of burglary in 1932 in state courts; and that, on September 22, 1938, he was found in possession of a loaded automatic pistol."

The Court said:

"The Government argues that the presumption created by the statute meets the test of due process heretofore laid down by this court. The defendants assert it fails to meet them because there is no rational connection between the facts proved and the ultimate fact presumed, that the statute is more than a regulation of the order of proof based upon the relative accessibility of evidence to prosecution and defense, and casts an unfair and practically impossible burden of persuasion upon the defendant,

[fol. 689]. "The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a

rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact."

Justice Roberts disagrees with this theory upon seemingly incontrovertible reasoning. He says:

"We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary (468) because of lack of connection between the two in common experience."

Where a law permits the jury to make a presumption or inferences the basis of its verdict, the law is void.

Justice Roberts said:

"Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate [fol. 690] the statutory provision."

"In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper, but the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible."

The Tot opinion states:

"The Congress has power to prescribe what evidence is to be received in the courts of the United States. The Section under consideration is such legislation.

But the due process clauses of the Fifth and Fourteenth Amendments sets limits upon the power of Congress or that of a state legislature to make proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated."

It seems obvious that the instant opinion conflicts violently with the foregoing decision.

The instant opinion concedes that it is a matter of conflicting probabilities—whether the failure to explain or deny has resulted from consciousness of guilt or some one [fol. 691] of numerous other reasons; the instant opinion at length discusses considerations of policy and convenience and thereby indicates that these questions are involved in arriving at its conclusion and were subjects which affected the adoption of said provisions.

The Tot opinion renders all such matters irrelevant and improper.

Hence, petitioner urges that this entire question be reviewed again.

II.

The Court Errs in Holding That the Evidence Justifies the Verdict and Is Not Contrary to the Law and the Evidence.

In petitioner's briefs heretofore filed and arguments to the court, this assignment has been presented quite fully from the standpoint of a review of the evidence and the permissible interpretations thereof.

The present purpose is to point out, from the opinion and decision of this court, reasons a fatal lack of evidence.

The opinion recites the circumstances which it holds strongly connected the defendant with the murder of Stella Blauvelt. These circumstances are:

1. Fingerprints on the surface of the inner door to the garbage compartment of the victim's kitchen.

2. The key to the apartment could not be found.

[fol. 692] 3. (a) Tops of woman's stockings which were taken from different places in defendant's room.

(b) At the end of each pair, away from the top was a tied knot or knots.

(c) They were not all of the same color.

(d) None of them matched with the bottom part of a stocking found under the body, or with others found in the victim's rooms.

5. The body had no stocking or shoes on it.

6. The deceased had been seen wearing stockings on the day of the murder.

7. There were stockings hanging in said kitchen and drawers in a dressing alcove, but no other parts of stockings were found.

8. The defendant gave the police false addresses.

9. When shown a picture of the deceased, defendant refused to look at it, stating that he did not like to look at dead people.

10. Deceased was in the habit of wearing rings with large sized diamonds and wore them on the fatal day.

11. A witness said he heard defendant ask someone whether he was interested in buying a diamond ring.

12. Testimony that screws were hanging in the hinges of the door, also fragments of wood.

13. The garbage pail was not in its customary place.

[fol. 693] Assuming that all of the above circumstances were established by admissible evidence, petitioner contends that it is insufficient to justify a reasonable belief that he was the murderer.

The opinion recites the prosecution's theories but they do not concern this discussion.

Unless, by some other circumstances, the accused was connected with the crime, numbers 2, 12 and 13 are entirely irrelevant.

Items 3 to 7 inclusive could not logically or legally warrant more than a conjecture or suspicion that the defendant had some connection, perhaps remote and innocent, with the murder.

Taken singly and collectively they did not show; That any one other than the victim removed her stockings; and no other evidence showed that she had not done so; that any stocking found in defendant's room had ever been in the

victim's room or in her possession; the fact that there were knots in the stocking was meaningless in the absence of proof that knots were involved in the murder.

Items (3d) and 7 tend to show that the stockings found in defendant's room were not connected with any possessed by the deceased.

Appellant insists that it is far-fetched and unwarranted to say as the opinion does that the presence of these women's stockings imply "a fetish or sexual degeneracy." Surely [fol. 694] every unmarried man who has some article which women wear in among his possessions is not to be stigmatized as a degenerate. To so consider this circumstance is to take judicial knowledge that men who do these things have no innocent motive; that they have no women relatives or friends for or from whom they were obtained, perhaps for some temporary purpose.

Surely humanity is not commonly believed and known to be so low.

The opinion views these stockings, wholly unconnected with the deceased as a "logical link in the chain of evidence", but it fails to say or suggest, except by the suggestion of fetish, with what link this alleged one connects.

It is urged that this is a matter which deserves reconsideration.

Items 10 and 11 could not warrant more than a suspicion. Without some proof that the ring about which Adamson is said to have spoken was not owned by him, or was one of the victim's, or that the defendant had no rings of his own, his possession of a diamond ring is no *evidence*, and supplies no link in the supposed chain of evidence to identify the defendant as the robber.

Item 9 is not susceptible of even a suspicion of the essential connection. Many people do not like to gaze at dead bodies. It is common knowledge that at funerals only relatives and close friends usually view the body.

Item 8, false statements to the police, have been held properly received in evidence as an admission against interest on the theory of concealment, but a mere admission of concealment, alone or with other similar admissions, has never been held sufficient to connect an accused with a crime.

Item 12 has been mentioned. It should be added that, without proof that the fragments had the appearance of

freshness, they would be insignificant, and the same is true of the presence of the screws.

The only real item of evidence as a circumstance connecting Adamson with the murder, including the prosecution theories, is the fingerprints.

Assume that the crime was committed by someone as the prosecutor contended, the presence of fingerprints is a circumstance which, aside from the defendant's right to remain mute, could call for an explanation.

But the burden is still on the People to prove the defendant guilty beyond a reasonable doubt, and for some reason not explained the experts failed to give their opinion as to whether the imprints were made at all recently or may have been old and hence unimportant.

The opinion herein mentions no evidence of this nature and we have found none.

In view of the circumstances of this case, wherein the [fol. 696] investigation and the securing of the fingerprints promptly after the crime was committed by someone, the circumstance of the presence of fingerprints on the door alone is irrelevant, or a weak or strong link to connect the defendant with the crime, depending on proof of when they were imprinted,

From the foregoing, petitioner contends that the decision in this case requires reconsideration. Otherwise, the wrong and an innocent man may pay the death penalty for another's foul murder.

III

The Court errs in holding that the evidence in support of the judgment is so strong that it is improbable that but for said error the jury would have failed to find the defendant guilty.

Petitioner believes that it has been shown that the evidence against him in this case is decidedly weak, and that no incriminating circumstance proved points unerringly to his guilt, but are all susceptible of interpretation in favor of innocence or as being harmless.

It is conceded in the opinion filed by this Court that error was committed in the instructions given and refused. Thus, the court said in its opinion:

"The jury, however, is concerned with the scope and nature of the consideration that it may give to defendant's failure to explain or deny incriminating evidence [fol. 697] and in the present case should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny."

The court also says in its opinion:

"The following proposed instruction, however, should have been given:

'You are instructed that the fact that the prosecutor has a right to comment on the failure of the the defendant to take the stand does not relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt and by competent and legal evidence.' "

These instructions were requested by the defendant and refused by the court. The existence of error, therefore, is apparent. The question remains as to whether such error gave rise to a miscarriage of justice.

In *People v. O'Bryan*, 165 Cal. 55, this Court first undertook to consider what constitutes a miscarriage of justice. In that case, the defendant had been taken by the sheriff before the grand jury and sworn and questioned concerning his connection with the crime. He was not in any way warned of his right to refuse to answer the questions or that they might be used against him. His statements fell short of constituting a confession, but did constitute admissions damaging to him.

This court, in affirming the conviction, said:

"Section 4½ of Article 6 of our Constitution must be given the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal, which must be overcome by a clear showing that no injury could have resulted.

On the other hand, we do not understand that the amendment in question was designed to repeal or abrogate the guarantees accorded persons accused of crimes by other parts of the constitution or to overthrow all statutory rules of procedure and evidence in criminal cases."

And:

"It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly, legal procedure in which the substantial rights belonging to defendants shall be respected."

And further:

"We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury [fol. 699] has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was *just, and that it would have been reached if the error had not been committed*, a new trial is not to be ordered." (Italics is ours.)

In *People v. O'Bryan*, every material matter covered by the admissions of the defendant was shown by other evidence, which was not contradicted. It is apparent, therefore, that a very different question was presented and where the errors simply resulted in cumulative testimony being placed before the jury, from the situation which exists here, where the rights of the appellant in a case in which conflicting inferences might reasonably be drawn from the evidence were not protected by proper instructions upon important questions of law—questions which, indeed, were the very most important presented in this case.

The question of the proper construction of Section 4½ of Article 6 of the Constitution was again before this court in the case of *People v. Fleming*, 166 Cal. 357. In that case, the Court said:

"In view of the very grave doubt as to the guilt of the defendant of the crime charged against him and in view of the nature of the acts charged against the

defendant as shown by the testimony of the witnesses [fol. 700] for the prosecution, we are of the opinion that, despite the general instructions of the court to the jury to the effect that they must base their verdict exclusively on the evidence, the conduct of the special prosecutor in the matters we have been discussing, which clearly constitute misconduct on his part, contributed materially to the verdict that was rendered."

In the instant case, the court invokes the rule that no objection being made to the argument of the prosecutor or at the time that his misconduct in the argument cannot be urged on appeal. We have always thought there is a tendency to carry this rule beyond the demands and, indeed, beyond the purposes of justice. However, we do not seek to question it here. What we are trying to do is to point out that by reason of that argument, it was particularly important that the instructions which were refused erroneously should have been given. Even though it were conceded that standing alone the mere failure to give those instructions would not likely affect the verdict of the jury, still when the prosecutor made language which could be "construed as a declaration that the jury should infer guilt solely from defendant's silence", then the cause of justice imperatively demanded that the jury be informed as a matter of law, that guilt could not so be inferred. The prosecutor has the closing argument. What he says is the last thing heard by the jury. It is that which is freshest and most active in the jurors' mind when they retire. In [fol. 701] the absence of instructions to the contrary, the jury naturally would assume the accuracy of the argument of the Deputy District Attorney, and would regard the silence of the defendant as a circumstance in the case from which an inference of guilt could be drawn.

In *People v. Bennett*, 79 Cal. App. 76, it was held that any act or action of a trial court in the trial of a criminal case which must necessarily have the effect of denying the accused a trial by a fair and impartial jury will not be mitigated by the terms of Section 4½ of Article 6 of the Constitution. It is our understanding that injury is no longer presumed from error; that the burden is cast upon a defendant upon appeal to show affirmatively that there has been a miscarriage of justice.

People v. Hoffman, 199 Cal. 155.

In the civil case of *Mintzer v. City of Richmond*, it was held to be incumbent upon the party appealing to show not only abstract error but error prejudicial to him upon the facts in evidence. That, then, is the burden which devolved upon appellant; that that burden he assumed, for he did show that on the vital question of the effect of his failure to testify the Court did refuse to give such instructions as if given and followed would have prevented the jury from following the argument of the District Attorney, which the Court properly has held constitutes misconduct.

For these reasons, we submit that there has been such a [fol. 702] miscarriage of justice as under the Constitution requires a new trial; that appellant has successfully assumed the burden of showing some very much more than mere abstract error; that he has shown errors which lent plausibility to an argument against appellant which ought not to have been made and which the court cannot say was not adopted by the jury as one of the reasons, and perhaps a principal reason, why their minds were satisfied as to the guilt of appellant.

Respectfully submitted, Morris Lavine and Milton B. Safier, by Milton B. Safier, Attorneys for Petitioner.

[fol. 702a] Received copy of the within Petition for Rehearing this January 18, 1946.

Robert W. Kenny, Attorney General, by Frank Richards, Deputy.

[fol. 703] IN SUPREME COURT OF CALIFORNIA

Crim. 4622

PEOPLE

v.

ADAMSON

ORDER DENYING PETITION FOR REHEARING—January 31, 1946

Appellant's petition for rehearing denied.

Dated: January 31, 1946.

[Vol. 704] IN THE SUPREME COURT OF CALIFORNIA

Criminal No. 4622

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
Respondent,

VS.

ADMIRAL DEWEY ANDERSON, Defendant; Appellant

On Appeal from the Superior Court in and for the County
of Los Angeles. (Superior Court No. 98,734)

JUDGMENT—January 4, 1946.

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged, and Decreed by the Court that the Judgments and the Order denying a New Trial of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and same are hereby affirmed.

I, A. V. Haskell, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 4th day of January, 1946, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 4th day of February, A. D. 1946.

A. V. Haskell, Clerk, by L. F. White, Deputy. (Seal 247.)

[fol. 704a] [File endorsement omitted]

IN THE SUPREME COURT OF CALIFORNIA

Cr. No. 4622

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and
Appellee,

v.

ADMIRAL DEWEY ADAMSON, Defendant and Appellant

Appeal denied April 8, 1946. Gibson, (Copy illegible)

PETITION FOR APPEAL—Filed April 3, 1946

[fol. 705] Aggrieved by the final decision of the Supreme Court of the State of California, on January 4, 1946, and by the order of the Supreme Court of California denying his petition for rehearing on January 31, 1946, appellant, Admiral Dewey Adamson, hereby prays that an appeal be allowed to the Supreme Court of the United States and for an order permitting appellant to proceed in forma pauperis, and that said order, in lieu of a bond, act as a supersedeas.

Morris Levine, Milton B. Safier, Attorneys for Appellant.

[fol. 706] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 3, 1946

Appellant Admiral Dewey Adamson assigns the following errors in the record and proceedings in said case:

I

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that the 1934 amendment to the California Constitution, Article I, Section 13, permitting comment by the court or counsel on defendant's personal failure to explain or deny any evidence or facts in a criminal case against him and the similar provision of the California Penal Code, Section 1323,

inherently, and as construed and applied in this case, do not violate due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in [fol. 707] holding that the 1934 amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, inherently, and as construed and applied in this case, are not unconstitutional in shifting the burden of proof to the defendant and infringing the presumption of innocence and thereby denying due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13 and California Penal Code, Section 1323, allowing comment by the court or counsel on defendant's failure to explain or deny any evidence or facts in a criminal case against him inherently, and as construed and applied in this case, are not unconstitutional as violating the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

IV

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that where the prosecutor repeatedly commented to the jury upon the defendant's failure to take the stand, to the extent of telling the jury:

"And here we started out in this case with a defendant, [fol. 708] as counsel says, clothed, with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand, or did not put any witnesses on the stand, he stood there with that presumption removed, based on the evidence in this case."

that it was not a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that said Article I, Section 13 and said Penal Code Section 1323 do not violate the due process clause of the Fourteenth Amendment of the Federal Constitution in that they each authorize the jury to presume that the defendant who fails to explain or deny any evidence against him is guilty as charged, although there is no reasonable or logical connection between such presumption and the basic fact upon which it is based, to wit, failure to testify, and said opinion, decision, determination and judgment in so holding; itself violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 709]

VI

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that a law which permits and in effect encourages the jury to give additional or conclusive weight to any and all evidence introduced by the People against the defendant and to draw unrestricted inferences therefrom against the defendant with respect to any such evidence which the defendant might reasonably be expected to explain or deny, where he fails to testify, even though he may have produced proof of convincing character, does not permit and encourage the jury to infer and presume the defendant's guilt from his mere failure to testify or to personally, under oath and during the trial, explain or deny any evidence against him, and by such error said opinion, decision, determination and judgment itself violates and sustains a law which violates the defendant's rights to due process of law and to the protection of the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

VII

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that Admiral Dewey Adamson was not denied due

process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by the introduction in evidence of portions of women's stock- [fol. 710-713] ings, which were admittedly not part of the deceased's stockings, and which served no other purpose than to influence or inflame the passions and prejudices of the jury, and to imply to this negro defendant a sex fetish and a low moral character.

For which errors appellant prays that the said judgment of the Supreme Court of the State of California in the above-entitled cause be reversed.

Morris Lavine, Milton B. Safier, Attorneys for Appellant.

[fol. 714] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant, Admiral Dewey Adamson, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California of January 4, 1946, (order denying petition for rehearing entered January 31, 1946,) and from each and every part thereof and having presented his petition for appeal, assignments of error, and prayer for reversal pursuant to the applicable rules and statutes,

It Is Now Here Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California.

It Is Further Ordered that the Clerk of the Clerk of the Supreme Court of California have prepared and certified a transcript of the record, proceedings, and judgments and order in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Supreme Court of the United States within thirty days from this date.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this fifteenth day of April, 1946.

[fol. 715] Citation in usual form showing service on Robert W. Kenny, omitted in printing.

[fol. 716] [File endorsement omitted.]

[fol 717] IN THE SUPREME COURT OF CALIFORNIA

[Title omitted]

PRAECIPE FOR RECORD—Filed April 3, 1946

To the Clerk of the Supreme Court of the State of California:

You will please prepare the following record in the above-entitled cause for the Supreme Court of the United States:

1. Complete reporter's transcript of all testimony and evidence offered or received and all rulings of the court, pages 1 to 492, inclusive, also the reporter's transcript of the argument of counsel contained in the reporter's supplemental transcript on appeal, pages 1 through 75;

2. Clerk's transcript as follows:

(a) The information, pages 1 to 5, inclusive;

(b) Arraignment and plea, page 6;

(c) Withdrawal of public defender, page 7;

(d) Minutes of the trial, pages 8 to 18;

(e) Verdict, pages 17, 18;

(f) Instructions given, pages 19 through 32;

[fol. 718] (g) Instructions refused, pages 33 through 59;

(h) Verdicts, pages 60, 61;

(i) Motion for new trial, pages 62 to 65;

(j) Order denying motion for new trial and judgments, pages 66 to 71;

(k) Commitment on death sentence, pages 72 to 74;

(l) Notice of appeal, page 75;

(m) Notice for preparation of record, pages 76 to 78;

(n) Grounds for appeal, page 78;

(o) Certification of County Clerk, page 80.

3. Opinion and judgment of the Supreme Court of the State of California of January 4, 1946;

4. Appellant's petition for rehearing;

5. Order of California Supreme Court of January 31, 1946, denying petition for rehearing;

6. Remittitur;
7. Affidavit for leave to proceed in forma pauperis and order thereon;
8. Petition for appeal;
9. Assignments of error;
10. Prayer for reversal;
11. Order staying execution;
12. Order for clerk to prepare and certify transcript;
13. Statement of jurisdiction on appeal;
14. Citations;
15. Notice to the Attorney General and Statement of [fol. 719] Rule 12, Subdivision 3, Rules of the Supreme Court.
16. Præcipe.

Morris Lavine, Milton B. Safier, Attorneys for Appellant.

[fols. 720-722]. Clerk's Certificates to foregoing transcript omitted in printing.

[fol. 723] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD—Filed May 20, 1946

Comes now the appellant and designates the points upon which he intends to rely on this appeal as the following:

I

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13, permitting comment by the court or counsel on defendant's personal failure to explain or deny any evidence or facts in a criminal case against him and the similar provision of the California Penal Code, Section 1323, inherently, and as construed and applied in this case, do not violate due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in

[fol. 724] holding that the 1934 Amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, inherently, and as construed and applied in this case, are not unconstitutional in shifting the burden of proof to the defendant and infringing the presumption of innocence and thereby denying due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13 and California Penal Code, Section 1323, allowing comment by the court or counsel on defendant's failure to explain or deny any evidence or facts in a criminal case against him inherently, and as construed and applied in this case, are not unconstitutional as violating the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

IV

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that where the prosecutor repeatedly commented to the jury upon the defendant's failure to take the stand, to the extent of telling the jury:

"And here we started out in this case with a defendant, [fol. 725] as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand, or did not put any witnesses on the stand, he stood there with that presumption removed, based on the evidence in this case."

that it was not a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States:

V

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that said Article I, Section 13 and said Penal Code Section 1323 do not violate the due process clause of the Fourteenth Amendment of the Federal Constitution in that they each authorize the jury to presume that the defendant who fails to explain or deny any evidence against him is guilty as charged, although there is no reasonable or logical connection between such presumption and the basic fact upon which it is based, to wit, failure to testify, and said opinion, decision, determination and judgment in so holding, itself violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 726]

VI

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that a law which permits and in effect encourages the jury to give additional or conclusive weight to any and all evidence introduced by the People against the defendant and to draw unrestricted inferences therefrom against the defendant with respect to any such evidence which the defendant might reasonably be expected to explain or deny, where he fails to testify, even though he may have produced proof of convincing character, does not permit and encourage the jury to infer and presume the defendant's guilt from his mere failure to testify or to personally, under oath and during the trial, explain or deny any evidence against him, and by such error said opinion, decision, determination and judgment itself violates and sustains a law which violates the defendant's rights to due process of law and to the protection of the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

VII

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that Admiral Dewey Adamson was not denied due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by the introduction in evidence of portions of women's stockings,

[fol. 727] which were admittedly not part of the deceased's stockings, and which served no other purpose than to influence or inflame the passions and prejudices of the jury, and to imply to this negro defendant a sex fetish and a low moral character.

The defendant also designates, as the record on appeal the entire reporter's transcript and the Clerk's Transcript on appeal, and the entire record as forwarded to this court.

Morris Lavine, Milton B. Safier, Attorneys for Appellant.

[fol. 727a] Rec'd copy of the within this May 18th, 1946.

Robert W. Kenny, Attorney General, Frank Richards, Dep., Attorneys for Appellee.

[fol. 727b] [File endorsement omitted.]

[fol. 728] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 10, 1946

On Consideration of the motion for leave to proceed in *forma pauperis* in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration or decision of this motion.

[fol. 729] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 10, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

Endorsed on cover: In forma pauperis. Enter Morris Lavine. File No. 50,912. California, Supreme Court, Term No. 102. Admiral Dewey Adamson, Appellant, vs. People of the State of California. Filed May 7, 1946. Term No. 102, O. T. 1946.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 102

ADMIRAL DEWEY ADAMSON,

Appellant,

v. S.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANT'S BRIEF

MORRIS LAVINE,

Counsel for Appellant.

INDEX

SUBJECT INDEX

	Page
Appellant's brief	1
Opinion below	1
Jurisdiction	1
Short statement of facts	3
Question presented	7
Specification of the assigned errors	9
Argument	12
Appendix—Fourteenth Amendment to Constitution of the United States and Article I, Section 13 of the Constitution of the State of California	27

TABLE OF CASES CITED

<i>Adamson v. People of the State of California</i> , 27 Cal. (2d) 478, 165 P. (2d) 3	1
<i>Boyd v. U. S.</i> , 116 U. S. 616, 29 L. Ed. 746	13, 14, 23
<i>Brown</i> , 81 Cal. App. 226	24
<i>Brown v. Walker</i> , 161 U. S. 591, 40 L. Ed. 819	13
<i>Chambers v. Florida</i> , 309 U. S. 227, 84 L. Ed. 724	26
<i>Counselman v. Hitchcock</i> , 142 U. S. 547, 35 L. Ed. 1110	13
<i>Flege v. State</i> , 93 Neb. 610, 142 N. W. 276	26
<i>Hale v. Henkel</i> , 201 U. S. 43, 50 L. Ed. 652	13
<i>Hurtado v. California</i> , 110 U. S. 516, 28 L. Ed. 232	26
<i>Johnson v. U. S.</i> , 318 U. S. 189, 87 L. Ed. 704	15
<i>Kirby v. U. S.</i> , 174 U. S. 47, 43 L. Ed. 890	18
<i>Lisenba v. California</i> , 314 U. S. 219, 86 L. Ed. 166	13
<i>McFarland v. American Sugar Co.</i> , 241 U. S. 86, 60 L. Ed. 904	20, 23
<i>McKay v. State</i> , 90 Neb. 63, 132 N. W. 741	26
<i>Moore v. Dempsey</i> , 261 U. S. 86, 67 L. Ed. 543	26
<i>Morrison v. California</i> , 291 U. S. 94, 78 L. Ed. 672	20, 23
<i>People v. Lanigan</i> , 22 Cal. (2d) 569	17
<i>People v. Madison</i> , 3 Cal. (2d) 668	26

	Page
<i>Snyder v. Massachusetts</i> , 291 U. S. 97, 78 L. Ed. 674	26
<i>Tot v. U. S.</i> , 319 U. S. 463, 87 L. Ed. 1519	17, 20, 23, 24

STATUTES CITED

Constitution of the State of California, Article I, Section 13	2, 7, 9, 10, 11, 12, 13, 18, 20, 22, 23
Constitution of the United States:	
Fourth Amendment	14
Fifth Amendment	12, 25
Fourteenth Amendment	8, 9, 11, 12, 15, 22, 23, 25
Penal Code of California:	
Section 1025	16
Section 1323	9, 12, 22
United States Code, Title 28, Sec. 344(a), 8 Federal Code Annotated, p. 44	1
Judicial Code, Section 237, as amended	1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 102

ADMIRAL DEWEY ADAMSON,

Appellant.

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPELLANT'S BRIEF ON APPEAL

Opinion Below

The opinion of the Supreme Court of California is reported in 27 Cal. (2d) 478, 165 P. (2d) 3.

Jurisdiction

Jurisdiction is sought under Title 28, Section 344 (a), U. S. Code; 8 Federal Code Annotated, page 44; Judicial Code, Section 237, as amended.

Title 28, Section 344 (a), U. S. C., is as follows:

"(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity

of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court on appeal."

There was drawn in question in this case the constitutionality under the Fourteenth Amendment of the Constitution of the United States, of Article I, Section 13 of the Constitution of California, which provides as follows:

"Art. I, § 13. *Permitting comment on evidence and failure of defendant to testify in criminal case.* In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; **but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.** The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (As amended November 6, 1934.)" (Black face type ours.)

The section of the California Constitution was challenged in the Superior Court of the State of California (R. 32), and again on appeal before the Supreme Court of the State

of California (R. 386 *et seq.*), and the claimed challenges were denied by the Supreme Court of the State of California on January 6, 1946. A Petition for rehearing was filed January 18, 1946, and denied by the Supreme Court of California on January 31, 1946.

A petition for appeal was filed in the Supreme Court of California on April 3, 1946, and again presented to Justice Wm. O. Douglas, who on April 15, 1946, allowed the appeal (R. 413).

Probable jurisdiction was noted by the Supreme Court June 10, 1946 and the petitioner was permitted to proceed *in forma pauperis* June 10, 1946.

Short Statement of Facts

The defendant, Admiral Dewey Adamson, a poor negro, was arrested on August 24, 1944 at Los Angeles, California (R. 308) and charged with the murder of Stella Blauvelt, a white woman 64 years of age.

Mrs. Blauvelt's body was found on the floor of her Los Angeles apartment at 744 South Catalina Street, Apartment 410, on July 24, 1944, about a month before Adamson's arrest. Her body showed that she had died at least on the afternoon of the preceding day (R. 46).

The defendant had, 24 years before, to-wit, February 3, 1920, been imprisoned in Missouri for the crime of burglary (R. 3) and also for robbery on June 30, 1927. Under California's procedure, the information must charge the prior convictions, (Section 1925 Penal Code) but if the defendant admits them before trial, then no reference can thereafter be made to it unless he denies it.

About two o'clock in the morning of August 24, 1944, the defendant was arrested and taken to the University Police Station at Los Angeles and booked there on suspicion of

murder. The officer who booked him related what happened as follows:

"A. When the defendant was booked the desk sergeant asked, 'What is the charge?' and the booking—the man who booked him, Officer Towns, said 'Suspicion of murder.' The defendant says, 'Oh, not me.' They went ahead and booked the defendant and the defendant was searched; after the defendant was searched the slip—booking slips were torn out of the machine and one copy of the booking slip was handed to the defendant on the desk and he pushed it away and he says, 'Oh, no you aren't going to put no murder on me,' and he threw the booking slip on the floor."

"Q. Now, directing your attention to the daytime—you said you saw him about 3 a.m., the daytime of that same day, did you have occasion to have the defendant in an automobile in the vicinity of the apartment house here located at 744 South Catalina?"

"A. Yes, we did."

"Q. On what street were you in a car with the defendant?"

"A. At that time we put the defendant into a car from the Wilshire Station and we drove to several locations . . ."

The officers then drove him over to the vicinity of the apartment house, interrogating him all the while, and accusing him. After the ride, the officer said:

"Then we went upstairs into the detective bureau, and at that time I asked the defendant if he was ready to tell us the whole story and he said, 'I haven't got anything to say,'"

"Q. Directing your attention to the People's Exhibit 35 for identification, Mr. Brennan, I will ask you to examine that and state when and where you first saw those stockings?"

"A. It was on Saturday evening which would be August 26th, I believe. Sergt. Wiseman found this stocking on top of the dresser in the room at 2460 South

St. Andrews. I saw him when he picked it up and he handed it to me to look at.

"Q. I am not very good on colors.

"A. It is a lighter color.

"Q. All right, the lighter color. Go ahead.

"A. These are the two I found in the dresser drawer, in the bottom dresser drawer, with some other things, some stockings and socks that were in there.

"Q. Now, with reference to the condition of these stockings, I notice each of the stockings has at the end which is away from what we might call the top a knot or knots tied in the end of each stocking. Was that the way they were found up there in the room of the defendant on the day of the 26th of August, 1944?

"A. Yes, that is exactly the way they were when we found them.

Mr. Roll: Now, I will now offer in evidence these stockings, if the court please, Exhibit No. 35.

The Court: 35?

Mr. Safer: I object to them as incompetent, irrelevant and immaterial, having no bearing on the issues in this case.

The Court: Marked 35 in evidence." (R. 314, 315)

No Evidence Had Been or Was Ever Adduced to Show That the Stockings Were Connected With the Dead Woman

No one saw the defendant or in fact any colored person at or in the neighborhood of the premises at any time involved in the case herein.

The sole alleged connecting link between the defendant and the offense were latent fingerprints which a police fingerprint man said he took on scotch tape from a door of the apartment where Mrs. Blauvelt resided, and said they corresponded with fingerprints of the defendant.

The evidence was entirely circumstantial. There was not one scintilla of evidence that the defendant murdered Mrs.

Blauvelt. There was no evidence that the defendant had been in the apartment. No one had seen him, and there was no evidence that anything taken from the apartment was actually in the possession of the defendant.

The murder was fixed as having occurred in broad daylight, by threads of some circumstantial evidence of someone having heard a thud and someone else having heard voices. No one ever saw a colored man in the apartment or in the apartment house, although the manager and her daughter were working around the building.

The defendant at the outset of the trial, in accordance with California procedure, admitted the prior convictions many years before of felony in Missouri alleged against him in the Information (R. 415). Thereafter, he did not take the witness stand, and the case rested upon the evidence furnished by the prosecution.

During the argument of the prosecutor to the jury, he commented several times on the failure of the defendant to take the witness stand (R. 367) and told the jury that it removed the presumption of innocence.

"Q. Have you heard from the lips of the defendant or a single witness called by the defendant where he was other than in that apartment? * * * So far as this defendant is concerned, as I said before, he does not have to take the stand. But it would take about twenty or fifty horses to keep someone off the stand if he was not afraid. He does not tell you. No." (R. 368)

"And here we started out in this case with the defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally,

at the conclusion of the People's case, when he did not take the stand or did not put any witnesses on the stand, he stood here with that presumption removed, based on the evidence in this case" (R. 369, 370).

"Well, there are a lot of things he could tell us. If he wasn't there, where was he? Where was he? . . . He could explain how his prints got on there." (R. 372)

In conclusion, he said:

"Now, counsel tries to lift from the defendant and place on himself the reason for the defendant not getting on the stand. He says, 'Put the blame on me.' That is what he told you. Well, I again repeat the statement I made this morning: that this defendant had the right to take the witness stand; it is a privilege afforded to him, and he did not do it. You can consider that with all the testimony in this case, and I ask you to consider it.

"In conclusion, I am going to make this one statement to you: Counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty'? Not one word from him, and not one word from a single witness. I leave the case in your hands" (R. 379).

Questions presented:

1. Whether Article 1, section 13, of the California Constitution, which provides that "in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury", and similar provisions found in section 1323 of the Penal Code of California, are in violation of the fourteenth amendment to the

Constitution of the United States, providing that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Whether the exhibition before the jury of parts of women's stockings allegedly found in a room occupied by the defendant, a poor negro, and not shown to have been in any way connected with the deceased, so far inflamed the passions and prejudices of the jury on the trial of the negro for murder and burglary as to deny him due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. Whether the defendant, a poor negro, was given a fair trial for murder and burglary guaranteed by the Fourteenth Amendment to the Constitution of the United States, where the only substantial evidence to connect him with the case were latent finger prints removed from a door in the apartment of the deceased and which were claimed to have been those of the defendant, and where in the trial of the case his claim of privilege against self-incrimination was used as a fact for the jury to consider to bring about his conviction and death penalty and his testimonial silence in the case was strenuously argued by the prosecutor as a fact for the jury to consider that the defendant had murdered the deceased.

Specification of the Assigned Errors

The Appellant specifies the following assigned errors upon which he intends to rely:

Specification of Error I

(Assignment of Error I)

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that the 1934 amendment to the California constitution, Article I, Section 13, permitting comment by the court or counsel on Defendant's personal failure to explain or deny any evidence or facts in a criminal case against him and the similar provision of the California penal code, Section 1323, inherently, and as construed and applied in this case, do not violate due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Specification of Error II

(Assignment of Error II)

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, inherently, and as construed and applied in this case, are not unconstitutional in shifting the burden of proof to the Defendant and infringing the presumption of innocence and thereby denying due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Specification of Error III

(Assignment of Error III)

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13 and California Penal Code, Section 1323, allowing comment by the court or counsel on Defendant's failure to explain or deny any evidence or facts in a criminal case against him and allowing the jury to consider such failure inherently, and as construed and applied in this case, are not unconstitutional as violating the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

Specification of Error IV

(Assignment of Error IV)

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that where the Prosecutor repeatedly commented to the jury upon the Defendant's failure to take the stand, to the extent of telling the jury: "And here we started out in this case with a Defendant, as Counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the people's case, when he did not take the stand, or did not put any witnesses on the stand, he stood there with that presumption removed, based on the evidence in this case." That it was not a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Specification of Error V

(Assignment of Error V)

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that said Article I, Section 13 and said penal code Section 1323 do not violate the due process clause of the Fourteenth Amendment of the Federal Constitution in that they each authorized the jury to presume that the defendant who fails to personally explain or deny any evidence against him is guilty as charged, although there is no reasonable or logical connection between such presumption and the basic fact upon which it is based, to wit, failure to testify, and said opinion, decision, determination and judgment in so holding, itself violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

Specification of Error VI

(Assignment of Error VI)

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that a law which permits and in effect encourages the jury to give additional or conclusive weight to any and all evidence introduced by the people against the defendant and to draw unrestricted inferences therefrom against the defendant and with respect to any such evidence which the defendant might reasonably be expected to explain or deny, where he fails to testify, even though he may have produced proof of convincing character, does not permit and encourage the jury to infer and presume the defendant's guilt from his mere failure to testify or to personally, under oath and during the trial, explain or deny any evidence against him, and by such error said opinion, decision, determination

and judgment itself violates and sustains a law which violates the defendant's rights to due process of law and to the protection of the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

Specification of Error VII

(Assignment of Error VII)

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that Admiral Dewey Adamson was not denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by the introduction in evidence of portions of women's stocking, which were admittedly not part of the deceased's stockings, and which served no other purpose than to influence or inflame the passions and prejudices of the jury, and to imply to this negro defendant a sex fetish and a low moral character.

ARGUMENT

Specification of Error I

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13, permitting comment by the court or counsel on defendant's personal failure to explain or deny any evidence or facts in a criminal case against him and the similar provision of the California Penal Code, Section 1323, inherently, and as construed and applied in this case, do not violate due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

California's statute, inherently and as construed and applied in this case, amounts to *testimonial compulsion*. It virtually says that silence in court is tantamount to an admission of guilt and may be then commented on by the prosecution and the court and the fact of his silence may be considered by the jury. Such was the argument made in this case repeatedly, such is the argument made in all of these types of cases where the defendant fails to take the stand.

This is not in accordance with the American way of life. Rooted deeply in our Federal Constitution and most of the Constitutions of the States, is the fundamental guarantee against compulsion to testify against one's self. It was written into the Bill of Rights in the Federal Constitution, *Royd v. U. S.*, 116 U. S. 616; *Counselman v. Hitchcock*, 35 L. Ed. 1110, 142 U. S. 547; *Brown v. Walker*, 40 L. Ed. 819, 161 U. S. 591; *Hale v. Henkel*, 50 L. Ed. 652, 201 U. S. 43, and in practically all the Constitutions of the States, including California, Article I, Sec. 13, and remained there from the beginning of constitutional Government in California until the 1934 Amendment. The statute now gives the right to the court and prosecution to argue guilt from the mere silence of the defendant and his claim of privilege becomes a weapon for the inference of guilt.

This court has said, in *Lisenba v. California*, 314 U. S. 219, 237, 86 L. Ed. 166, 180:

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."

"The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case stands no better if, by resort to the

same means, the defendant is induced to confess and his confession is given in evidence. As we have said, 'due process of law . . . commands that no such practice . . . shall send any accused to his death.'

To induce a defendant to testify against himself, otherwise to hold that his failure to do so personally, spells guilt, is compulsion by statute to take the witness stand or else have comment of such an unfavorable nature made by the prosecution and court to the jury as to one's guilt from such silence and the claim of privilege as to preclude a fair trial.

California's statute goes farther than a confession. It says that *silence in the courtroom* is tantamount to a confession of guilt. It says the jury may consider that fact.

The case of *Boyd v. U. S.*, 116 U. S. 616, 29 L. Ed. 746, was a case where a Federal statute required the production of certain books and records upon notice by the government, and upon the failure of the production of such books and records, the allegations stated in the motion to produce shall be taken as confessed, unless his failure to produce the same shall be explained to the satisfaction of the court. This court held such a statute unconstitutional, saying that "Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."¹

¹ *Boyd v. United States*, 116 U. S. 621, 29 L. Ed. 748.

But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant

It is respectfully submitted that California's statute is equally despotic in character and that its presence and the results which flow from it give this conviction "the fatal taint" which is proscribed by the Fourteenth Amendment to the Constitution of the United States. Otherwise, it would mean that men can be forced to convict themselves by their own testimony, or else that the fact of their *failure to testify* results in conviction by construing the fact of silence as a confession of guilt.

Such state statute offends the procedural safeguards guaranteed by the Fourteenth Amendment to fair public trials by juries in a democracy, and permits the use of compulsion by statute or otherwise of self-incriminatory testimony or its inevitable consequences under this statute—guilt from the mere silence of the accused.

In *Johnson v. U. S.*, 318 U. S. 185, 195, 87 L. Ed. 704, 710; the court said:

"But where the claim of privilege is asserted and unqualifiedly granted, the requirements of *fair trial* may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (*Wilson v. United States*, 149 U. S. 60, 37 L. Ed. 650, 13 S. Ct. 765) is then applicable. As stated by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privi-

or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of.

lege would be a mockery of justice, if either party is to be affected injuriously by it.' *Phelin v. Kenderdine*, 20 Pa. 354, 363; *Wireman v. Com.* 203 Ky. 62, 63, 261 S. W. 862. And see *State v. Vroman*, 45 S. D. 465, 473, 188 N. W. 746; *Carne v. Litchfield*, 2 Mich. 340; *People v. McGungill*, 41 Cal. 429. . . . An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. . . . If advised by the court that his claim of privilege though granted would be employed against him, he might well never claim it. If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed."

In California the constitution assures the accused that his claim of the privilege which it grants will not be used against him, but when he claims it, legalizes use of the fact that he claimed it by the prosecutor, the court and even the jury.

But in California, if an accused has suffered prior convictions anywhere of a previous crime, the prosecution is under a duty to allege this prior conviction in the indictment or information. If the accused admits the prior conviction when arraigned or before trial, then the statute provides that no reference may be made to this prior conviction before the jury (Section 1025, California Penal Code).² The

² 1025. *Previous conviction*.—When a defendant who is charged in the indictment or information with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted or informed against, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer must be entered by the clerk in the minutes of the court, and must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer must be entered by the clerk in the minutes of the court, and the question whether or not he has suffered such previous conviction must

risk of taking the witness stand by one who has been accused in the indictment or information of prior felonies and thus to face possible prejudice growing out of it, has been the subject of comment by the California courts in their opinions.

In the case of *People v. Lanigan*, 22 Cal. (2) 569, the California Supreme Court held that an accused who had suffered a prior conviction of a felony was greatly prejudiced by the appointment of counsel who was representing a co-defendant who had not been previously convicted of a felony, because the delicate question would arise in the trial of the case as to whether, in view of one client's previous conviction of a felony, he should be put on the witness stand. The court then recognized the great prejudice which flows to an accused who has suffered prior conviction of felony and is subject to impeachment under California law on that ground alone.

In *Tot v. U. S.*, 319 U. S. 463 at 470, 87 L. Ed. 1519 at 1525, the court said:

"... the defendant is under the handicap, if he takes the witness stand, of admitting prior conviction of violent crimes. His evidence as to acquisition of the firearm or ammunition is thus discredited in the eyes of the jury before it is given."

In California, the law specifically permits impeachment because of prior conviction of felony, and thus the accused who has suffered a prior conviction is put to his election either to disclose such prior convictions and thus be dis-

be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial.

credited in the eyes of the jury, or decline to take the witness stand, in which case he is subject to unfair comment by the prosecutor and court and to *jury inferences* that result in almost certain conviction.

It is respectfully submitted that such holding is not due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Specification of Error II

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, inherently, and as construed and applied in this case, are not unconstitutional in shifting the burden of proof to the defendant and infringing the presumption of innocence and thereby denying due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The effect of the statute is virtually to shift the burden of proof to the defendant and remove the presumption of innocence with which a defendant is constitutionally clothed in the United States of America.

The presumption of innocence has been held to be one of the strongest presumptions in our Constitutional safeguards. *Kirby v. U. S.*, 174 U. S. 47; 43 L. Ed. 890. It goes with a defendant throughout his trial and he may rely on it. Article I, Section 13 of the California Constitution, however, strips him of that presumption. The prosecution so argued in this case (R. 369, 370).

The law presumes, in the absence of proof to the contrary, that everyone obeys the law. The law prefers to speak and think well of people rather than evil, and that is why one is clothed with the presumption of innocence and the presumption that the law has been obeyed.

In the United States, the State has the burden of establishing all the essential elements of the crime with which the accused is charged and must prove his guilt beyond a reasonable doubt. The accused may stand on this presumption of innocence, withholding all proof. The presumption of innocence is a shield, not a weapon, but the constitutional provision in California strips him of this shield and turns it into a weapon.

The shield in the minds of the framers of our Government and the generally established principles safeguarding the rights of people in the United States was to protect them against the type of inquisition and torture which had been so prevalent on the Continent of Europe and which had so often accompanied the proceedings of the star chamber. They, too, had in their minds the excesses which had been committed under the Statutes of Philip and Mary when suspects were third-degreed by examining magistrates.

The privilege may not be violated because in a particular case its restraints are inconvenient or because the supposed malefactor may be a subject of public execration or because the disclosure of his wrong-doing will promote the public weal.

It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it.

Historic liberties and privileges are not to bend from day to day because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.

In other words, inherently, and as construed and applied by the California courts, the failure of a defendant to take the witness stand would strip him of a presumption of innocence and result in an inference of guilt from a defendant's mere silence in the presence of court and jury.

This has been repeatedly held contrary to due process of law.

Morrison v. California, 291 U. S. 94, 96, 78 L. Ed. 672;

Tot v. U. S., 319 U. S. 463, 87 L. Ed. 1519;

McFarland v. American Sugar Co., 241 U. S. 86, 60 L. Ed. 904.

There certainly is no logical inference of guilt from the mere failure of an accused to take the witness stand. He may fail to take it because of prior convictions of felony. This is the most common reason. Or he may fail to take it because he knows no facts with relation to it, or he may fail to take it because he has difficulties as a witness and may easily be confused or put in a false light; he may have difficulty explaining what other persons might easily explain. Many considerations enter into his failure to do so, but to permit comment by the prosecution on the subject results in a false inference of guilt.

As said in *Tot v. U. S.*, 319 U. S. 463 at 469; 87 L. Ed. 1519 at 1525:

“ * * * it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation.”

Specification of Error III

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, allowing comment by the court or counsel on defendant's failure to explain or deny any evidence or facts in a criminal case against him, and allowing the jury to consider such failure, inherently, and as construed

and applied in this case, are not unconstitutional as violating the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

We can think of no greater privileges or immunities of a citizen of the United States guaranteed by the Fourteenth Amendment than that of not being compelled by statute to take the witness stand or have his failure to do so constitute testimonial admission of guilt.

The language of the Constitution, "and may be considered by the court or jury," places no restriction upon force or weight of the inference or presumption to be drawn from failure to testify. No standard is provided nor is any legislative purpose or plan revealed to guide Court or jury. Hence, from such failure the inference may be drawn or the presumption assumed that the silence of the accused establishes guilt, and a jury may do this independently of comments by prosecutor or Judge.

Such a statute strips the accused not only of the procedural safeguards found in the Bill of Rights, but strips him of a privilege and an immunity of a citizen, which is inherent in our American form of Government.

Specifications of Errors IV, V and VI

IV

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that where the prosecutor repeatedly commented to the jury upon the defendant's failure to take the stand, to the extent of telling the jury: "And here we started out in this case with a defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward, piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of

innocence, and finally, at the conclusion of the People's case, when he did not take the stand, or did not put any witnesses on the stand, he stood there with that presumption removed, based on the evidence in this case.", that it was not a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding: that said Article I, Section 13 and said Penal Code Section 1323, do not violate the due process clause of the Fourteenth Amendment of the Federal Constitution in that they each authorize the jury to presume that the defendant who fails to explain or deny any evidence against him is guilty as charged, although there is no reasonable or logical connection between such presumption and the basic fact upon which it is based, to wit, failure to testify, and said opinion, decision, determination and judgment in so holding, itself violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

VI

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that a law which permits and in effect encourages the jury to give additional or conclusive weight to any and all evidence introduced by the people against the defendant and to draw unrestricted inferences therefrom against the defendant with respect to any such evidence which the defendant might reasonably be expected to explain or deny, where he fails to testify, even though he may have produced proof of convincing character, does not permit and encourage the jury to infer and presume the defendant's guilt

from his mere failure to testify or to personally, under oath and during the trial, explain or deny any evidence against him, and by such error said opinion, decision, determination and judgment itself violates and sustains a law which violates the defendant's rights to due process of law and to the protection of the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

It is our position that the presumption of innocence is a fundamental presumption that inheres in all accused in the United States of America. It is in itself evidence. An accused may rely on it and unless it is overcome by evidence which overcomes the presumption, it cannot be stripped from him by statutory compulsion. This is what Article I, Section 13 of the California Constitution does. The statute inherently and as construed and applied by the State through its court and prosecutor violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Morrison v. California, 291 U. S. 94, 96, 78 L. Ed. 672;

McFarland v. American Sugar Co., 241 U. S. 86; 60 L. Ed. 904;

Tot v. U. S., 319 U. S. 463; 87 L. Ed. 1519.

What we have heretofore said regarding the violation of such procedure against due process applies equally to the protection of the Fourteenth Amendment regarding the privileges and immunities of citizens of the United States. Certainly one of the great privileges granted is the privilege not to be compelled to incriminate oneself or to take the witness stand to bring about one's conviction, or to have the law provide for the right of stating that testimonial silence is tantamount to guilt.

Boyd v. U. S., 116 U. S. 616;

Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97.

With respect to Specification V, appellant has contended and now urges that since the power granted to the jury to consider the defendant's failure to testify is without limitation and has no standard to guide and control the jury, a presumption of absolute character is authorized, and that there is no reasonable or logical connection between the basic fact, to-wit, failure to testify and the ultimate fact, guilt of the accused. Such a presumption is a violation of the guarantee of due process. (*Tot v. United States*, 319 U. S. 463, 87 L. Ed. 1519.)

That many reasons other than consciousness of guilt cause defendants to fail to testify is commonly known in the legal profession and in the Courts. The reason most often existing is avoidance of impeachment by being compelled to admit prior conviction of felony. Another common reason is, upon advice of counsel who decides that his client by reason of some characteristic, such as poor memory, being easily confused or ignorant, or in ill health, would be a poor witness, and under cross-examination, damage his case even though ever so innocent.

One or more of these reasons combined with counsel's belief that the People's proof is insufficient or that a convincing rebuttal can best be provided by other defense witnesses or that testimony which the accused might give might open the door to revelation of something to his discredit, although not criminal.

In *Brown*, 81 Cal. App. 226, the court took judicial knowledge that defendants often fail to testify for other reasons than being conscious of their guilt, and this statement was expressly approved by the State Supreme Court.

On the other hand in a majority of criminal trials the accused testifies, and undoubtedly a majority of those who do so are guilty; and it has never been suggested that the mere fact that a defendant exercises his constitutional

right to testify should add additional weight to the presumption of innocence.

From any viewpoint there is no rational relation between a defendant's testifying or failing to do so and his guilt or innocence, and this, it is believed and insisted, is a matter of common knowledge and experience among the members of the legal profession.

There are two other special factors in this novel constitutional provision: Regardless of the convincing character of proof produced by other defense witnesses, merely because he fails to testify and explain any and all evidence against him, the jury is empowered to infer guilt, and, equally capriciously, it is provided that this burden rests upon him even in respect to matters of which he is totally ignorant.

Specification of Error VII

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that Admiral Dewey Adamson was not denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by the introduction in evidence of portions of women's stocking, which were admittedly not part of the deceased's stockings, and which served no other purpose than to influence or inflame the passions and prejudices of the jury, and to imply to this negro defendant a sex fetish and a low moral character.

During the trial of the case, Officer Brennan, who went to the place of residence of the defendant, a month after the alleged offense, found a part of a stocking on top of the dresser and two parts of stockings in the bottom dresser drawer. These stockings were admitted in evidence as Exhibit 35, although the prosecuting attorney conceded that they were not part of the stocking found beneath the body of Mrs. Blauvelt.

There was nothing to connect the defendant with the stockings thus introduced in evidence, but it furnished an alleged additional motive for the crime—a sexual one. Appellant is a negro. The mere suggestion of such a motive was calculated to excite the prejudices of the jurors and to inflame their minds against the accused, and, therefore, was highly prejudicial to the accused. Consequently, the admission of the stockings in evidence was not only irrelevant and incompetent (*People v. Smith*, 55 Cal. App. 320), but was for the purpose of inflaming the passions and prejudices of the jury to the deprivation of a fair trial for the accused.

This court has repeatedly held that incompetent evidence used to inflame the passions and prejudices of the jury offends due process of law.

Chambers v. Florida, 309 U. S. 227, 242; 84 L. Ed. 716, 724;

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674;

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543;

Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232;

McKay v. State, 90 Neb. 63, 132 N. W. 741;

Flege v. State, 93 Neb. 610, 142 N. W. 276;

People v. Madison, 3 Cal. (2) 668.

Wherefore, the defendant prays that this Honorable Court declare Article I, Section 13, to the Constitution of California, as amended, unconstitutional, and that Section 1323 of the Penal Code of the State of California be declared unconstitutional, and that the judgments herein be reversed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

APPENDIX

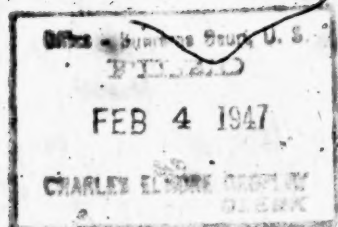
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. I, Sec. 13. Permitting comment on evidence and failure of defendant to testify in criminal cases. In Criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (As amended November 6, 1934.)

1323 of the Penal Code of California Provides: *Defendant.* A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 102

ADMIRAL DEWEY ADAMSON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

REPLY BRIEF

MORRIS LAVINE,
Counsel for Appellant.

INDEX

Page

<p>Liberty under the Fourteenth Amendment; right against compulsory testimony or silence considered as testimony is prohibited against state action. <i>Twining v. New Jersey</i> distinguished. In light of history it should in any event be overruled.</p> <p>A statute which permits comment by the district attorney upon the failure of the accused to testify and statutory permission for the jury to consider such failure to testify as a fact against him is a denial to the petitioner of due process of law and of his privileges and immunities as a citizen of the United States guaranteed by the Fourteenth Amendment in that he was thus compelled to be a witness against himself (by his very silence in the courtroom) in violation of the Fifth Amendment.</p> <p>California's Article I, Section 13 of its Constitution and Section 1323 of the Penal Code compel self-incrimination or permit the jury to draw arbitrary or untrue inference and result in unfair trial or unfair results of trial.</p> <p><i>The unanswered position of petitioner</i> is (1) California's Article I, Section 13 and Section 1323 of California Penal Code inherently and as construed and applied in this case</p> <p style="padding-left: 2em;">(a) violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States as that Amendment is viewed in the light of the clause forbidding self-incrimination in the Fifth Amendment and in the light of present day conception of justice under the Constitution</p> <p style="padding-left: 2em;">(b) violate the privileges and immunities of citizens of the United States</p> <p style="padding-left: 2em;">(c) violate the right not to have burden of proof shifted and an arbitrary presumption or inference of guilt flow from testimonial silence in the courtroom</p>	<p>1</p> <p>10</p> <p>17</p> <p>17</p> <p>17</p> <p>18</p> <p>18</p>
---	--

	Page
2. The trial resulted in a sentence of death without observation of fundamental fairness required by due process of law under the Fourteenth Amendment to the Constitution of the United States	18
3. Article 1, Section 13 of the California Constitution and Section 1323 of the California Penal Code inherently and as construed and applied in this case shifted the burden unconstitutionally to the accused and permitted arbitrary or false presumptions to flow from the mere failure of the accused to take the witness stand	19
What the jury considers by reason of the defendant's silence in the courtroom	20
History of the right to testify and the right not to use this shield as a sword	22
Reasons why the accused does not take the witness stand	27
As set out in <i>Wilson v. U. S.</i> , 149 U. S. 60, 66.	28
Lack of fair trial	33
Review of the evidence in the case	33
Comment by the prosecutor on the failure of the defendant to take the stand	34
Comparison of the comments of California prosecutor with comments made by the trial judge in <i>Twining v. New Jersey</i>	40
<i>Twining v. New Jersey</i> further analyzed	41
The prosecutor's argument	47
The defendant's requested instructions to cure the errors refused. Cases cited	47
<i>Greenberg v. The People of the State of California</i> cited, where similar contentions raised, now pending before this Court, No. 466	50
Fundamental error raised here comparable with <i>Mooney v. Holohan</i> , 294 U. S. 103	51
What difference is there in deceiving a jury by perjured evidence and deceiving it by false inference of guilt?	52

Standards of decency more or less universally accepted	53
Does this statute offend those standards	53
Star Chamber method of inquisition discussed and compared	53
Comparison between third-degree out of court-room, and in a courtroom	54
"Statutory heat" as replacing the club, the fist, the bludgeon and the rubber hose; administered in court instead of a dark cell	54
Construction of the statute by the State	55
The additional facts which the jury considered according to California Court by reason of defendant's silence	56
Unfair trial	57
Article I, Section 13 of the California Constitution and Section 1323, California Penal Code unconstitutionally shift the burden of proof and create an arbitrary presumption of guilt and therefore violate the Fourteenth Amendment to the United States Constitution	61
The arbitrary presumption which follows from the defendant's failure to take the witness stand	61
Inflaming the passions and prejudices of the jury against the defendant by reason of the stocking tops	63
The fatal drops of poison	64
Constitutional guarantees secure the blessings of liberty under its preamble and under its Fourteenth Amendment	64
Courts must safeguard against illegitimate and unconstitutional practices getting their first footing by silent approaches	64
Due process of law preserved for all by our Constitution commands that no such practice as that disclosed by this record shall send any accused to his death	65

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 102

ADMIRAL DEWEY ADAMSON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

REPLY BRIEF

Liberty under the Fourteenth Amendment

**Twining v. New Jersey Distinguished. In Light of History
It Should in Any Event Be Overruled**

The State of California has failed to answer our contentions in this case, either in its brief or its oral argument, which were ably presented by Mr. Walter L. Bowers, Esq., Assistant Attorney-General of the State of California.

It relies principally, if not solely, upon the holding of this Court rendered in 1908 in *Twining v. New Jersey*, 211 U.S. 78.

But that holding was based upon an *assumption* of a non-existent situation in the case and differs from the case at bar.¹ Nor did the *Twining* case involve a state statute which allows silence in the courtroom to supply the failure of proof. Furthermore that case was a direct evidence case

as contra-distinguished from the present case which is based entirely on circumstantial evidence.

Nor did that case (1) shift the burden of proof, nor (2) give the right to the jury to consider an arbitrary and false presumption to flow from the failure of the accused to testify in the courtroom and to presume the defendant guilty from his testimonial silence.

That case was rendered shortly after *Davidson v. New Orleans*, 96 U. S. 97, where at page 104, the Court pointed out that what constitutes due process of law under the 14th Amendment is not clearly defined and the Court itself is uncertain as to its exact scope; that what is and what is not due process of law as then understood involves a "process of inclusion and exclusion."² Since then the inclusions and exclusions have expanded and changed.

Nearly forty years of history and suffering, including two wars, have given us a new concept of ordered liberty, a concept based upon a clear examination of those things which should be included and excluded in a living world under a Constitution that was meant to protect all the human rights for which this republic stands.

We are coming back to the Blessings of Liberty for which the Preamble and the Constitution says our country was formed.

And so we have asked this Court to overrule *Twining v. New Jersey*, *supra*, and to include in the fundamental con-

¹ "The prevailing opinion of the court added: 'We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption.' " In view of this language the point should unquestionably be regarded as still an open one under the United States Constitution.

² Professor Roscoe Pound says that "due process" is a standard. As a standard, he says it is a standard and not a principle and that a great part of the difficulty of lawyers is that they seek to treat this standard as if it were a principle susceptible of definition. Justice Frankfurter in his opinion in *State of Louisiana v. Resweber*, No. 142, October Term, 1946, treats due process as a standard.

cepts of ~~liberty~~ as guaranteed by the due process clause of that Amendment, the safeguard against self-incrimination and compulsory testimony in a criminal case. This has been guaranteed by our history and by the history of common law, in fact, it is basic and fundamental in the history of mankind. It was well recognized in Roman law and in the trial of Jesus. It was the defense tactic selected by Him on that historic occasion.³

In *Boyd v. U. S.*, 116 U. S. 616, this Court said:

* * * Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. *Boyd v. United States*, 116 U. S. 616, 631-632.

³ In St. Matthew, 26:60 it is said: "60 . . . yea, though many false witnesses came, yet found they none. At the last came two false witnesses,

61 And said, this fellow said, I am able to destroy the temple of God, and to build it in three days.

62 And the high priest arose, and said unto Him, answerest Thou nothing? What is it which these witness against Thee?

63 But Jesus held his peace."

Again in St. Mark, 14:57 it is said:

"57 And there arose certain, and bare false witness against Him, saying,

58 We heard him say, I will destroy this temple that is made with hands, and within three days I will build another made without hands.

59 But neither so did their witness agree together.

60 And the high priest stood up in the midst, and asked Jesus, saying, Answerest Thou nothing. What is it which these witness against Thee?

61 But He held His peace, and answered nothing."

In St. John, 19:8 it is said: "When Pilate therefore heard that saying, he was the more afraid;

9 And went again into the judgment hall, and saith unto Jesus, Whence art Thou? But Jesus gave him no answer."

“What, let me inquire, must then have been regarded as principles that were fundamental in the liberty of the citizen? Every student of English history will agree that long before the adoption of the Constitution of the United States certain principles affecting the life and liberty of the subject had become firmly established in the jurisprudence of England and were deemed vital to the safety of freemen, and that among those principles was the one that no person accused of crime could be compelled to be a witness against himself. It is true that at one time in England the practice of ‘questioning the prisoner’ was enforced in Star Chamber proceedings. But we have the authority of Sir James Fitzjames Stephen, in his History of the Criminal Law of England, for saying that soon after the Revolution of 1688 the practice of questioning the prisoner died out. Vol. 1, p. 440. The liberties of the English people had then been placed on a firmer foundation. Personal liberty was thenceforward jealously guarded. Certain it is, that when the present Government of the United States was established it was the belief of all liberty-loving men in America that real, genuine freedom could not exist in any country that recognized the power of government to compel persons accused of crime to be witnesses against themselves. And it is not too much to say that the wise men who laid the foundations of our constitutional government would have stood aghast at the suggestion that immunity from self-incrimination was not among the essential, fundamental principles of English law.” *Twining v. New Jersey*, 211 U. S. 78, 117, 118.

Compulsory confessions, in or out of a courtroom, have consistently been held by this Court to be offensive to America's concept of ordered liberty.

Chambers v. Florida, 309 U. S. 235.

Liberty Is a Guarantee under the Fourteenth Amendment Right Against Compulsory Testimony Is Such a Liberty

Professor Charles Warren in 39 Harvard Law Review 431, 460, in discussing "The New Liberty Under the Fourteenth Amendment" says:

"Why is not a right against self-incrimination contained in the Fifth Amendment as much a part of a person's 'liberty' as his right of freedom of speech? The Court might so hold, without overruling *Twining v. New Jersey*, for that case only considered the question whether a state law removing provisions against compulsory self-incrimination was a failure of 'due process'; it did not consider whether the right in question was a 'liberty' which the state could not deprive *Twining* of 'without due process of law.' Certainly the right to be free from unreasonable search and seizure, contained in the Fourth Amendment, is as much a part of a person's 'liberty' as his right of freedom of speech."

Justice Harlan's able and analytical dissenting opinion in *Twining v. New Jersey* should be the standard of due process of today.

Justices Brandeis and Holmes lived to see their dissenting opinions become the majority opinions. See Brandeis "A Free Man's Life" pages 632 *et seq.* We think Justice Harlan's reasoning is now justified in the light of experience and time.

Professor Pound in his admirable book "Social Control through Law" points out that standards of conduct—of fairness must govern. (Pg. 48). The standards of the horse and buggy days must give way to the automobile, the train, the airplane.

We have asked this Court in its determination of this case to overrule *Twining v. New Jersey*. Factually, our

case differs from *Twining v. New Jersey* wherein the case was based upon direct evidence and no statute inherently or as construed or applied in the case was involved but there was only the short statement of the trial judge in his charge to the jury, which we will quote in full hereafter. There the case was not one of circumstantial evidence, as here, but direct evidence.

In the present case we have a statute which the Supreme Court of California admits results in a measure of compulsion to take the witness stand to testify or incriminate oneself.

Nowhere in our States at present may a defendant now be called to the witness stand by the prosecution and compelled to testify. The California statute is next door to it, however, compelling by indirection what cannot be done by direction. Does this offend due process of law or take away one of the liberties protected against State action by the 14th Amendment to the Constitution of the United States as represented and defined by the 5th Amendment to the Constitution? If so, then this decision must settle the question.

As Justice Frankfurter pointed out in the *Willie Francis* case, No. 142, Oct. Term, 1946, throughout the decisions of this Court run the phrases: "Fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana*, 272 U. S. 312, 316; *Brown v. Mississippi*, 297 U. S. 278, 285; *Lisenba v. California*, 314 U. S. 219. "No higher duty, no more solemn responsibility rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately brilliant and unsullied for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." *Chambers v. Florida*, 309 U. S. 241; *Lisenba v. California*, 314 U. S. 219. "A fair and enlightened system of justice"—etc. These are standards of

liberty, which every State must maintain. This Court in its 1908 decision admits in *Twining v. New Jersey* that "The exemption from testimonial compulsion, that is from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law though there may be differences as to its exact scope and limits," 211 U. S. 91. "At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty and a safeguard against heedless, unfounded or tyrannical prosecutions."

Testimonial Compulsion

California's Art. I, Sec. 13, as amended in 1934, is a form of testimonial compulsion. The opinion of the Court itself in *Adamson v. People of the State of California* so admits it (R. 385). The Court says: "The practical effect of the 1934 amendment may be that many defendants who otherwise would not take the stand will feel compelled to do so to avoid the adverse effects of the comments and consideration authorized by the amendment. Such a coercive effect, however, is sanctioned by the amendment, which, being later in time, controls provisions adopted earlier."

We respectfully submit that examination of California's statutes under common law principles requires this Court to consider testimonial compulsion all forbidden by any state.

But independent of a review under those principles we respectfully assert that the fundamental concepts of justice embodied in the 5th Amendment to the Constitution of the

United States forbidding self-incrimination are equally applicable to the 14th Amendment.

Justice Harlan in *Twining v. New Jersey* said in 1908:

"I am of the opinion that as immunity from self-incrimination was recognized in the Fifth Amendment of the Constitution and placed beyond violation by any Federal agency, it should be deemed one of the immunities of citizens of the United States which the Fourteenth Amendment in express terms forbids any State from abridging— as much so, for instance, as the right of free speech (Amdt. II), or the exemption from cruel or unusual punishments (Amdt. VIII), or the exemption from being put twice in jeopardy of life or limb for the same offense (Amdt. V), or the exemption from unreasonable searches and seizures of one's person, house, papers or effects (Amdt. IV)." Even if I were anxious or willing to cripple the operation of the Fourteenth Amendment by strained or narrow interpretations, I should feel obliged to hold that when that Amendment was adopted all these last-mentioned exemptions were among the immunities belonging to citizens of the United States, which, after the adoption of the Fourteenth Amendment, no State could impair or destroy. But, as I read the opinion of the court, it will follow from the general principles underlying it, or from the reasoning pursued therein, that the Fourteenth Amendment would be no obstacle whatever in the way of a state law or practice under which, for instance, cruel or unusual punishments (such as the thumb screw, or the rack or burning at the stake) might be inflicted. So of a state law which infringed the right of free speech, or authorized unreasonable searches or seizures of persons, their houses, papers or effects, or a state law under which one accused of crime could be put in jeopardy twice or oftener, at the pleasure of the prosecution, for the same offense.

"It is my opinion also that the right to immunity from self-incrimination cannot be taken away by any State consistently with the clause of the Fourteenth Amendment that relates to the deprivation by the State of life or liberty without due process of law." *Twining v. New Jersey*, 211 U. S. 78, 124, 125.

Since Justice Harlan's dissent, this Court has held freedom of speech and freedom of the press safeguarded by the 1st Amendment are protected by the 14th Amendment. *Dejonge v. Oregon*, 299 U. S. 353, 364; *Herndon v. Lowry*, 301 U. S. 242, 259. Freedom of the press: *Grosjean v. American Press Co.*, 297 U. S. 233; *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 707; or the free exercise of religion: *Hamilton v. Regents*, 293 U. S. 245, 262; are safeguarded by the 14th Amendment. It has repeatedly protected one accused of crime and guaranteed his right to the benefit of counsel. *Powell v. Alabama*, 287 U. S. 45. It has protected one against perjured testimony in the trial of a case. *Mooney v. Holohan*, 294 U. S. 103. It has expressed rebellion against double jeopardy guaranteed by the 5th Amendment as equally applicable to the 14th Amendment as held in the recent case of *Willie Francis*, No. 142, Oct. Term, 1946. It has expressed rebellion against the use of confessions obtained by third degree methods. *Chambers v. Florida*, 309 U. S. 227.

But equally on a parity with double jeopardy in the 5th Amendment is the provision against self-incrimination and we respectfully submit that a statute which inherently results in testimonial compulsion is abhorrent to liberty-loving people. **"It is contrary to the principles of a free government. It is abhorrent to the ancestors of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power but it cannot abide the pure atmosphere of political liberty and personal freedom."**

If then, as expressed in this Court's great opinion in *Chambers v. Florida*, 309 U. S. 227, confessions or statements taken as result of testimonial compulsion "would make of the constitutional requirement of due process of law a meaningless symbol because the same liberty has torn away from the courtroom a statute which permits the same to take place within a courtroom is equally offensive to due process of law and is proscribed by the 14th Amendment. As stated in the opinion of this Court the due process clause of the 14th Amendment—just as that in the 5th Amendment—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate then and thereafter to protect at all times people charged with or suspected of crime by those holding positions of power and authority."

A Statute Which Permits Comment by the District Attorney upon the Failure of Accused to Testify and Statutory Permission for the Jury to Consider Such Failure to Testify as a Fact Against Him Is a Denial to the Petitioner of Liberty Guaranteed by Due Process of Law and of His Privileges and Immunities as a Citizen of the United States Guaranteed by the Fourteenth Amendment in That He Was Thus Compelled to Be a Witness Against Himself (by His Very Silence in the Courtroom) in Violation of the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

This is one of the Liberties guaranteed by the Fourteenth Amendment.

As this Court has said only recently that the construction of the Constitution must be a gradual process of judicial

inclusion and exclusion as time goes on (see also *Davidson v. New Orleans*, 96 U. S. 104; *State of Louisiana ex rel. Willie Francis v. Resweber*, No. 142, October 1946 Term), it is respectfully submitted that the process of inclusion must include the fundamental right expressed by the framers of our Constitution in the Fifth Amendment. In *Bram v. United States*, 168 U. S. 543, the Court quoting at length from *Brown v. Walker*, 161 U. S. 596, said:

"The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities

of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that, a maxim which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

“There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguished attributes.

“In *Burrows v. High Commission Court* (1616) Bulst., 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law (Taylor, Ev., Section 886), certain it is that without a statute so commanding, in *Felton's case* (1628), 3 How. St. Tr., 371, the Judges unanimously resolved, on the question being submitted to them by the King, that ‘no such punishment as torture by the rack was known or allowed by our law.’ ”

Story on the Constitution, 5th Ed., 1782, at 1788 said:

“This is but an affirmance of a common law privilege. But it is of inestimable value. It is well known that in some countries not only are criminals compelled to give evidence against themselves but are subjected to the rack of torture in order to procure a confession of guilt. And, what is worse, it has been (as if in mocking or scorn) attempted to excuse or justify it, upon the score of mercy and humanity to the

accused. It has been contrived, it is pretended, that innocence should manifest itself by a stout resistance, or guilt by plain confession; as if a man's innocence were to be tried by the hardness of his constitution, and his guilt by the sensibility of his nerves. Cicero, many ages ago, though he lived in a state wherein it was usual to put slaves to the torture in order to furnish evidence, has denounced the absurdity and wickedness of the measure in terms of glowing eloquence, as striking as they are brief (see 4 Black Comm. 326). They are conceived in the spirit of Tacitus and breathe all his pregnant and indignant sarcasm. Ulpian, also at a still later period in Roman jurisprudence, stamped the practice with severe reproof." (1 Gilb., Hist., 249.)

2 Story's Commentaries on the Constitution, p. 697 (5th Ed.).

"The humanity of our law always presumes an accused party innocent until he is proved to be guilty." This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact."

Cooley's Const. Lim., 6th Ed., p. 375.

"A far more important requirement is that the proceeding to establish guilt shall not be inquisitorial. A peculiar excellence of the common-law system of trial over that which has prevailed in other civilized countries, consists in the fact that the accused is never compelled to give evidence against himself. • • •

"A disposition has been manifested of late to allow the accused to give evidence in his own behalf; and statutes to that effect are in existence in some of the states, the operation of which is believed to have been generally satisfactory.

These statutes, however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance. . . . Otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger.' "

Cooley's Const. Lim., 379, 384, 386.

In *Counselman v. Hitchcock*, 142 U. S. 563, the Court said:

"It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures."

In *People v. Courtney*, 94 N. Y. 492, the Court said:

"A law which, while permitting a person accused of crime to be a witness in his own behalf, should at the same time authorize a presumption of guilt from his omission to testify, would be a law adjudging guilt without evidence, and while it might not be obnoxious to the constitutional provision against compelling a party in a criminal case to be a witness against himself, would be a law reversing the presumption of innocence, and would violate fundamental principles, binding alike upon the legislature and the courts."

In *Quinn v. People*, 123 Ill., at page 345, the Court said:

"It is claimed by the prisoner, that in the conduct of the trial, his rights, under the constitution and laws of the

State, were violated and disregarded. It is clear that whenever a trial is so conducted as to deprive the accused of any substantial right, he has not had a fair trial, within the meaning of the constitution, and a trial which is not fair is not only violative of common right, but is contrary to the spirit and genius of our free institutions. It is also a reproach to the courts that permit it, and a blot upon the jurisprudence of the State."

In *McKnight v. U. S.*, 115 Fed. Rept. 982, 983, the Court says:

"The reference to the right of the defendant to testify where he does not see fit to avail himself of the privilege puts him in a position where the jury will draw inferences against him from his silence, and the statute which was intended as a shield for protection will be turned into a weapon of attack in establishing his guilt." * * *

"* * * After allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him from his silence, when the law gives him the right to speak."

In *U. S. v. Three Tons of Coal*, 6 Biss. 386, the Court said:

"The common law rule upon this subject was thus established in England, and thus it existed and was the law of that realm, when the American colonies were organized, and when this government was formed. Under the shelter of judicial decision, the subject became secure * * * and could not be compelled to accuse himself * * * and with the adoption of the fourth and fifth amendments, principles established at common law became reaffirmed in the Constitution."

In *O'Neil v. Vermont*, 144 U. S. 323, 370:

"I fully concur with Mr. Justice Field that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction."

"These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution adopted by the convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States."

In *Twining v. New Jersey*:

"... The court says: 'The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against one's self, forced by any form of legal process, is universal in American law, though there may be a difference as to its exact scope and limits.'"

Twining v. New Jersey, 211 U. S. 78, 121.

And Justice Harlan says and we agree:

"... The Fourteenth Amendment would have been disapproved by every State in the Union if it had saved or recognized the right of a State to compel one accused of crime, in its courts, to be a witness against himself"

Twining v. New Jersey, 211 U. S. 78, 123.

Could the Fourteenth Amendment be adopted today with an exemption of California's Article I. Section 13 or Section 1323 in it, applied to all States? We think not. If not, they violate the Fourteenth Amendment.

Professor Charles Warren in 39 Harvard Law, 431, 460, in discussing the new liberty under the 14th Amendment points out that even without overruling *Twining v. New Jersey*, it would be proper to decide that the provisions of the 5th Amendment against self-incrimination are a part of a person's liberty equally with his right of free speech.

The 14th Amendment furnishes an additional guarantee against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. Among those rights are the right not to accuse oneself of crime nor to have one's silence in not accusing oneself considered as evidence or a basis for presumption or inference of guilt.

California's Article I, Section 13, of Its Constitution and Section 1323 Penal Code Compel Self-Incrimination, or Permit the Jury to Draw Arbitrary or Untrue Inferences and Result in Unfair Trials and Unfair Results of Trial.

The unanswered position of petitioner is:

I

California's laws (Article I Section 13 California Constitution and Section 1323 California Penal Code) inherently and as construed and applied in this case:

(a) violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States as that amendment is viewed in the light of the clause forbidding self-incrimination in the Fifth Amendment and in the light of a present day conception of ordered liberty and justice under the constitution. We further assert that the Fifth Amendment is a part and parcel of ordered liberty of all citizens, including California, and must be applied to the states along with or as part and parcel of the Fourteenth Amendment.

(b) violate the privileges and immunities of citizens of the United States and of the State of California. That one of the great privileges of an American is to be free from star chamber or other questioning by anyone in the United States.

(c) violate the right not to have the burden of proof shifted and an arbitrary presumption or inference of guilt to flow from testimonial silence in the courtroom.

The California laws under attack remove the blessings of liberty guaranteed by the preamble of the Constitution of the United States to all liberty-loving peoples within our borders.

In America immunity from testimonial compulsion is a principle and standard inherent in orderly and due process of law in a free republic. The right to remain silent in a courtroom without having that silence considered as evidence of guilt or as a fact from which the jury may infer or presume guilt is a fundamental principle basically accepted by the common law and by liberty loving people everywhere.

II

Our second great proposition left unanswered is that the California law as construed and applied in this case has denied to the accused under sentence of death that *fundamental fairness* to which he is entitled under due process of law guaranteed by the 14th Amendment. This fundamental unfairness results from comment permitted by the California Statutes under attack which must be viewed not as mere error in the course of the trial but as that fundamental violation of due process which has always required of this court a re-examination of all the facts of the case regardless of any particular state rulings. *Lisenba v. California*, 314 U. S. 219; *Mooney v. Holohan*, 294 U. S. 103; *Chambers v. Florida*, 309 U. S. 235. This has been the

holding of this Court where the issues involved have been questions of the use of involuntary confessions and whether a state court has ruled favorably or unfavorably this Court has examined the entire record to determine for itself whether there existed that fundamental unfairness which fatally infected the fairness of the trial. *Lisenba v. California*, 314 U. S. 219.

III

Our third great proposition is that the California laws (Article I, Section 13, California Constitution and Section 1323 California Penal Code) inherently and as construed and applied in this case have shifted the burden of proof unconstitutionally to the accused and have permitted arbitrary and false presumptions or inferences to flow from the mere *failure* of the accused to take the witness stand in the courtroom.

None of these great tenets which we presented in our opening brief and which we argued in oral argument have been answered in the State's brief in this case, nor in oral argument. *Twining v. New Jersey*, 211 U. S. 78, was a direct evidence case and not a case of circumstantial evidence and even the law of New Jersey does not permit comment on the failure of defendant to explain or deny by his own testimony personally in a case which involved purely circumstantial evidence, Judge Richard Hartshorn of New Jersey pointed out in the *American Bar Ass. Journal*, Vol. 56, p. 153. In *State v. Wines*, 65 N. J. Law 31, the comment was held error in the case.

Even New Jersey would not permit such comment or inference in a case such as the one at bar. Judge Richard Hartshorn of New Jersey said: "It is only where the prosecutor has proven direct evidence of the commission of the crime which the defendant has had

personal knowledge of, that then his refusal to testify may be taken against him. If, on the other hand, mere circumstantial evidence has been produced which he cannot *directly* personally deny then his failure to testify cannot be taken against him. That is the state rule in New Jersey." 56 A. B. A. Jour. p. 143.

Can the State of California in justice say that a man's life shall be taken from him on such an inference of guilt based on the testimonial silence of the accused? If perjury in the production of evidence is a denial of due process, is not the use of an arbitrary presumption of guilt from silence and the likelihood that a false reason may ensue equally a denial of due process?

Silence as testimony for the jury to consider is shocking to the sense of justice. It is arbitrary and unwarranted. It is an unfair result obtained in an unfair way. See *Snyder v. Massachusetts*, 291 U. S. 97, opinion of Justice Roberts on procedural due process.

California, in its brief and oral argument holds to the contrary.

What the Jury Considers by Reason of the Defendant's Silence in the Courtroom

This case demonstrates the additional evidence which the jury considers by reason of the testimonial silence of the accused in the courtroom in this very case and the additional evidence which the jury is asked to consider because of the testimonial silence of the accused.

Thus the jury is asked to conclude: (1) that because the accused has not testified it follows that the fingerprints on the garbage disposal door, with both similarities and dissimilarities are nevertheless his fingerprints because he has not taken the witness stand; that without one shred of

evidence as to when or how they got on the garbage disposal door that it follows that they were put there on the date and time when Mrs. Blauvelt was killed. This arbitrary inference follows, says the State, because he has not taken the stand. The jury may thus consider and conclude arbitrarily, of course, that because of such fingerprints on a garbage disposal door it follows that—because of his silence—he is the man who killed her although there is no evidence whatsoever of the fact that he did or that he was ever there or ever saw her; (2) that by his testimonial silence and the fact of such silence in the courtroom the jury is permitted to conclude that the defendant took a ring or rings of the deceased; (3) that by reason of his testimonial silence in the courtroom and failure to take the witness stand the jury is authorized to conclude that the defendant in a cocktail bar had a conversation with some unknown man about selling him a diamond ring and that the diamond ring which he referred to was none other than the diamond ring which it is claimed was missing from the deceased's body when she was found even though there is no proof that the defendant ever took such a ring or that the deceased was actually wearing it just before her death or that the landlady who had talked to her had seen such a ring; (4) that by his testimonial silence and the fact of such silence in the courtroom the jury is permitted to conclude the additional fact that the defendant removed stockings from the deceased and was interested in the stocking tops from such stockings and that because the defendant failed to explain the presence in his room of the stockings by personally taking the stand that this fact of testimonial silence may be considered by the jury as proof that the defendant had drawn the deceased's dress up around her waist and had torn the panties at the crotch and that this torn part was laid up over the top of the dress (R. 304).

While the theory of the State was that the person who entered the apartment entered it for the purpose of committing burglary yet the testimony shows that whoever was in the apartment had remained from approximately 3:30 in the afternoon until approximately between 6 and 8 p. m. (R. 287, 290, 233) although it is very strange that a person who might have gone into the apartment to commit burglary would remain from between three and five hours when the only thing allegedly taken was a couple of rings off a finger, with three rings on it, and one was left behind. Nevertheless, the jury was permitted to draw the false conclusion that whoever may have committed burglary had also committed the murder.

The State, acting through its officials, was thus able to impinge upon the jury the conclusions of guilt of *murder* and *burglary* with no evidence that the defendant had murdered the deceased but with great reliance upon the testimonial silence of the accused to support what was lacking in the proof. This is a denial of due process of law guaranteed by the 14th Amendment and is as equally shocking to the conscience of humanity of English liberty-loving people, equal with the use of a confession in which guilt is extorted by threats or promises which have been repeatedly condemned by this Court.

When the Congress of the United States authorized an accused to take the witness stand it included in the statute a specific provision that no presumption of guilt should flow from the failure of accused to take the stand. *Bruno v. U. S.*, 308 U. S. 287.

This was but the common law view and the American view of decency for if the failure of the accused to take the witness stand could constitute testimonial evidence of his guilt then the privilege of testifying has become a club instead to force the accused to the stand. We have presented this argument on the basis that the guarantee of the

5th Amendment against self-incrimination should be incorporated into the 14th Amendment and that *Twining v. New Jersey, supra*, insofar as it holds in direct evidence case and without statute to the contrary should be overruled by this Court. We are not here concerned merely with a trial as in the *Twining* case where the judge in the charge to the jury tells the jury it may consider such a situation. We are here concerned with a statute which goes much farther and authorizes false and arbitrary inferences of guilt because of the failure of the accused to testify. The reformers have reformed too much and have invaded valid constitutional guarantees to protect life and liberty and have removed them from the pale of fair trial.

It is not sufficient to examine merely judicial interpretations of the constitutions as legislatures as well as the judiciary are charged with the duty of providing due process and protecting fundamental rights. *Mooney v. Holohan*, 294 U. S. 103. The Constitution of the United States protects witnesses in the federal courts from compulsory self-incrimination, and the constitution of most every state gives similar protection in the state courts.⁴ The accused was nowhere a competent witness before the eighteen-sixties,⁵ but was presumed innocent and the legislation which made him competent nearly always provided that his failure to testify should not create any presumption against him. In view of such statutes it has seldom been necessary for the courts to determine how far the constitutions protect the accused.⁶ We should, therefore, consider legislative as well as judicial interpretations of the constitutions; we should see how the laws have developed as well as the way they have been applied in the

⁴ See *Bruno v. U. S.*, 308 U. S. 287.

⁵ 1 Wigmore, Evidence, 2d Ed., 1008 (1920).

⁶ See, e. g., *People v. Tyler*, 36 Cal. 522 (1869).

courts, in their generally expressed and almost universal view as being a safeguard to fair trial.

The first legislation upon the subject was in 1864. In that year Maine enacted a statute ⁷ which simply provided that the accused might testify at his own request but not otherwise. This law was followed word for word by California in April, 1866,⁸ and in substance by South Carolina in September, 1866.⁹ In May, 1866, Massachusetts enacted a statute ¹⁰ similar to that of Maine but with the added proviso, "nor shall the neglect or refusal to testify create any presumption against the defendant." In November, 1866, Vermont ¹¹ provided that "the refusal of such person to testify shall not be considered by the jury as evidence against him." In February, 1867, Nevada ¹² made the accused a competent witness but provided that "in all cases wherein the defendant to a criminal action declines to testify the court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause." In July, 1867, Connecticut ¹³ followed the example of Massachusetts but added, "nor shall such neglect be alluded to, or commented upon by the prosecuting attorney or by the court." The Connecticut law was followed in substance by Minnesota in March, 1868,¹⁴ and by Ohio in May, 1869.¹⁵ In

⁷ Act of March 25, 1864; Laws of Me. (1864), c. 280, p. 214.

⁸ Act of April 2, 1866; Statutes of Cal. (1865-6), c. 644, p. 865.

⁹ Act of September 19, 1866; Statutes of S. C. (1866), Act No. 4780, Sec. 2; 13 S. C. Stats.; p. 366(9).

¹⁰ Act of May 26, 1866; Mass. Acts and Resolves (1866), c. 260, p. 245. See also Act of June 22, 1870; Mass. Acts and Resolves (1870), c. 393, Sec. 1, p. 302.

¹¹ Act of November 19, 1866; Vt. Laws (1866-7), No. 40, p. 52.

¹² Act of February 18, 1867; Statutes of Nev. (1867), c. 18, p. 58. Passed over veto by votes of 17 to 0 in Senate and 37 to 1 in House.

¹³ Act of July 19, 1867; Conn. Laws (1867), c. 98, p. 101.

¹⁴ Act of March 6, 1868; Minn. Gen. Laws (1867-8), c. 70, p. 110.

¹⁵ Act of May 6, 1869; 66, Laws of Ohio, p. 308.

1869 Wisconsin¹⁶ and New York¹⁷ enacted laws similar in substance to that of Massachusetts. In the same year a New Hampshire law¹⁸ declared that "nothing herein contained shall be construed as compelling and such person to testify, nor shall any inference of guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify." After legislation in several territories and in several other States,¹⁹ Congress in 1878²⁰ provided for the federal courts that the accused

¹⁶ Act of March 4, 1869; Laws of Wis. (1869), c. 72, p. 70.

¹⁷ Act of May 7, 1869; Laws of N. Y. (1869), c. 678, p. 1597.

¹⁸ Act of July 7, 1869; Sess. Laws of N. H. (1867-71), c. 23, p. 282.

¹⁹ Colorado: Act of February 5, 1872; Sess. Laws (1872), p. 95; Idaho: Act of January 14, 1875; Rev. Laws of Idaho (1874-5), Sec. 12, p. 321; Illinois: Act of March 27, 1874; Rev. Stats. (1874), c. 38, Sec. 426; Kansas: Act of February 21, 1871; Laws of Kan. (1871), c. 115, p. 280; Maryland: Act of April 7, 1876; Laws of Md. (1876), c. 357, p. 601; Missouri: Act of April 18, 1877; Laws of Mo. (1877), p. 356; Montana: Laws of Mont. (1872), pp. 271, 272; Nebraska: Act of March 4, 1873; Laws of Neb. (1873), Sec. 473, Gen. Stats. 1873, p. 827; Pennsylvania: Act of April 3, 1872; Laws of Pa. (1872), p. 34; Act of March 24, 1877; Laws of Pa. (1877), p. 45; see also Act of May 21, 1885; Laws of Pa. (1885), p. 23; Rhode Island: Act of March 15, 1871; R. I. Laws (1871), c. 907, p. 134; R. I. Gen. Stats. (1872), c. 203, Sec. 39; Utah: Act of February 22, 1878; Laws of Utah (1878), p. 151; see also Utah Comp. Laws (1876), p. 505; Washington: Act of November 29, 1871; Laws of Wash. (1871), p. 105; Wyoming: Act of December 6, 1877; Laws of Wyo. (1877), p. 25; and see Wyo. Comp. Laws (1876), c. 14, Sec. 129. In Florida the accused might make a statement under oath before the jury: Act of January 16, 1866; Laws of Fla. (1866), c. 1472, Sec. 4, p. 36; Act of June 1, 1870; Laws of Fla. (1870), c. 1816, p. 13.

²⁰ Act of March 16, 1878, 20 Stat. 30; U. S. C., Tit. 28, Sec. 632 (1926). The act was based upon the Massachusetts law: 7 Cong. Rec., pt. 1, p. 385. Prior to the act of 1878 the accused was not a competent witness. The revised edition of the Revised Statutes was published in the same year. It showed that the only section then in force which apparently established a general rule as to testimony in criminal trials was Sec. 858, and that section did not apply: *Logan v. United States*, 144 U. S. 263 at 299-303, 12 Sup. Ct. 617 (1897). 1 Wigmore, Evidence, 2d Ed., p. 81 (1920). As explained in Wigmore, the act of 1789 established for the federal courts the common law rules as to the competency of witnesses which were in force in 1789 or when the states were admitted to the Union.

"shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." That limitation prevents any unfavorable comments by federal courts upon the failure of accused persons to testify.²¹ In 1879, after decisions which will be referred to hereafter, the Maine law was amended²² by providing that "The fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be taken as evidence of his guilt." And so on through the states. At the present time the laws of forty-two states provide that the failure of the accused to testify shall not create any presumption against him.²³

²¹ *Wilson v. United States*, 149 U. S. 60, 13 Sup. Ct. 765 (1892); *Reagan v. United States*, 157 U. S. 301, 305, 15 Sup. Ct. 610 (1894); *Bruno v. U. S.*, 308 U. S. 287.

²² Act of February 14, 1879; Laws of Me. (1879), c. 92, Sec. 1, p. 112.

²³ Arkansas: Ark. Dig. Stat. (Crawford & Moses, 1921), Sec. 3123; Colorado: Colo. Am. Stat. (Mills, 1930), Sec. 2111; Louisiana: Act of 1916; Laws of La. (1916), p. 379 (see La. Code of Crim. Proc. (Dart., 1932), p. 226); Maine: Me. Rev. Stat. (1930), c. 146, Sec. 19; Maryland: 1 Md. Ann. Code (Bagby, 1924), Art. 35, Sec. 4; Massachusetts: Mass. Gen. Laws (1921), c. 233, Sec. 20; New Mexico: N. M. Stat. (Court-right, 1929), Sec. 45-504; New York: N. Y. Code Crim. Proc. (Bender, 1932), Sec. 393; North Carolina: N. C. Code Ann. (Michie, 1931), Sec. 1799; Oregon: Ore. Code Ann. (1930), Sec. 13-929; South Carolina: S. C. Crim. Code (1922), Sec. 97 (as interpreted in *State v. Howard*, 35 S. C. 197, 203 (1891)); Tennessee: Code of Tenn. (Thannan, 1932), Sec. 3783; Vermont: Vt. Gen. Laws (1917), Sec. 2554; Washington: Wash. Comp. Stats. (Remington, 1922), Sec. 2148; Wisconsin: Wis. Stat. (1929), Sec. 325-13.—The provision in the Louisiana act cited above was not repealed by its omission from Art. 461 of the 1928 Code of Criminal Procedure. Only provisions in conflict with the code were repealed by it: Art. 582. Those who drafted the code had proposed to authorize comment on the failure of the accused to testify, and consequently had omitted from Art. 461 the provision of existing law as to presumption. The Senate, by a vote of 39 to 0, and the House, by a vote of 76 to 3, struck out the proposed authorization of comment: Louisiana S. J. for June 13, 1928, pp. 295, 297, 316; H. J. for June 19, 1928, pp. 544, 545.

or that it shall not be subject to comment,²⁴ or contain both such provisions.²⁵

The states which do not conform to the general rule are: Georgia, where the accused is not a competent witness;²⁶ Iowa,²⁷ New Jersey,²⁸ and Ohio,²⁹ where the constitutions

²⁴ Connecticut: Conn. Gen. Stat. (1920), Sec. 6480; Florida: Fla. Comp. Laws (1927), Sec. 8385; Indiana: Ind. Ann. Stat. (Burns, 1926), Sec. 2267.

²⁵ Alabama: Ala. Code (Michie, 1928), Sec. 5632; Arizona: Ariz. Code (Struckmeyer, 1928), Sec. 5179; California: Cal. Pen. Code (Deering, 1923), Sec. 1323; Delaware: Del. Rev. Code (1915), c. 129, Sec. 4215; Idaho: Idaho Comp. Stat. (1919), Sec. 9131; Illinois: Ill. Rev. Stat. (Smith-Hurd, 1930), c. 38, Sec. 734; Kansas: Kan. Rev. Stat. Ann. (1923), c. 62, Sec. 1420-1; Kentucky: Ky. Stat. (Carroll, 1930), Sec. 1645; Michigan: Mich. Comp. Laws (1929), Sec. 14218; Minnesota: Minn. Stat. (Mason, 1927), Sec. 9815; Mississippi: Miss. Code Ann. (1930), Sec. 1530; Missouri: Mo. Rev. Stat. (1929), Sec. 3693; Montana: Mont. Rev. Code (Choate, 1921), Sec. 12177; Nebraska: Neb. Comp. Stat. (1929), c. 29, Sec. 2011; New Hampshire: N. H. Pub. Laws (1926), c. 336, Sec. 36; North Dakota: N. D. Comp. Laws Ann. (1931), Sec. 10837; Oklahoma: Okla. Comp. Stat. Ann. (Bunn, 1921), Sec. 2698; Pennsylvania: Pa. Stat. Ann. (Purdon, 1930), Tit. Crim. Proc., Sec. 631; Rhode Island: R. I. Gen. Laws (1923), c. 342, Sec. 5028; Texas: Tex. Rev. Code Crim. Proc. (Vernon, 1928), Art. 710; Utah: Utah Comp. Laws (1917), Sec. 9279; Virginia: Va. Code Ann. (Michie, 1930), Sec. 4778; West Virginia: W. Va. Code (1931), c. 57, Art. 3, Sec. 6; Wyoming: Wyo. Rev. Stat. (1931), c. 33, Sec. 801.

²⁶ Ga. Ann. Code (Park, 1914), Sec. 1037. See also Act of December 15, 1866, Ga. Laws, 1866, p. 138. The fact that a witness claimed privilege against compulsory self-incrimination in one proceeding could not be shown against him in another proceeding: *Loewenherz v. Merchants Bank*, 144 Ga. 556, 560, 87 S. E. 778 (1915). The court quoted from *State v. Bailey*, 54 Iowa 414, 416, 6 N. W. 589 (1880). "It would indeed be strange if the law should confer upon a witness this right as a privilege, and at the same time should permit the fact of his availing himself of it to be shown as a circumstance against him. It certainly is a privilege of very doubtful character if the effect of claiming it is as prejudicial to the witness as the effect of waiving it."

²⁷ Iowa Code (1927), Sec. 13891, provided not only that the failure of the defendant to testify should have no weight against him at the trial but that if the attorney for the state should refer to such failure he would be guilty of a misdemeanor and the defendant would for that cause alone be entitled to a new trial. The Act of March 24, 1929, 43 Gen. Acts, c. 269, p. 311, referred to that section by number and repealed it.

clearly do not prevent comment upon the silence of the accused; Nevada,³⁰ where the court may not comment upon his silence unless he requests it to instruct the jury upon his right to refrain from testifying; and South Dakota, where a rule which had prevailed since 1879³¹ was changed in 1927³² to provide that the failure of the accused to testify in his own behalf was a proper subject of comment by the prosecuting attorney.³³

The statutes and presumptions have always been with due regard to the fact that many reasons other than guilt motivate a defendant not to take the witness stand, as said in *Wilson v. U. S.*, 149 U. S. 60, 66.

"But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed

²⁸ Common law forbids compulsory self-incrimination though the Constitution does not: *State v. Zdanowicz*, 69 N. J. L. 619 at 622, 55 Atl. 743 (1903). Defendant may testify if he so desires: Act of June 14, 1898, N. J. Laws, 1898, c. 237, Sec. 57, p. 886. Comment on failure to testify is permitted in direct evidence cases. *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651 (1898); *Twining v. New Jersey*, 211 U. S. 78 at 90, 29 Sup. Ct. 14 (1908); *State v. Kisik*, 99 N. J. L. 385, 125 Atl. 239 (1924).

²⁹ See note 4.

³⁰ Act of March 17, 1915, Stats. of Nev. (1915), c. 157, Sec. 2, p. 192; Nev. Comp. Laws (Hillyer, 1929), Sec. 10960.

³¹ Act of February 10, 1879, S. Dakota Sess. Laws (1879), c. 16, p. 49.

³² S. D. Sess. Laws (1927), c. 93, p. 116.

³³ This South Dakota statute was held unconstitutional. *State v. Wolfe*, 266 N. W. 116, 104 A. L. R. 464, commented upon in 104 A. L. R. 478.

on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him.

"In this case this provision of the statute was plainly disregarded. When the District Attorney, referring to the fact that the ~~defendant~~ did not ask to be a witness, said to the jury, 'I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime,' he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by a failure to offer himself as a witness." *Wilson v. United States*, 149 U. S. 60, 66.³⁴

* Justice Jackson said in *Hickman v. Taylor*, No. 47 October Term 1946.

"Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness."

What about the witness without a legal education? Sometimes ~~he~~ may crucify a brilliant prosecutor. Most often the prosecutor would crucify him.

³⁴ This statement of the prosecutor is similar to one in the instant case.

A California case, based upon the law in existence prior to the Amendment under attack, expresses the general views on the subject:

"At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the People the burden of affirmatively proving the offense alleged against him. When he has once raised this issue by his plea of not guilty the law says he shall thenceforth be deemed innocent till he is proved to be guilty; and both the common-law and the statute give him the benefit of any reasonable doubt arising on the evidence. Now, if, at the trial, when, for all the purposes of the trial, the burden is on the People to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. *If the inference in question could be legally drawn the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*

"Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give, we are

satisfied that the defendant, with respect to exercising his privilege under the provisions of the Act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question." *People v. Tyler*, 36 Cal. 522, 529-530.

In *Petite v. People*, 8 Colo. 518 at 519; 9 Pac. 622, the court said:

"For if silence is to be taken as evidence of guilt, defendant's option is of but little avail; he is practically forced to testify, and once upon the stand may be required to give the very testimony upon which his conviction shall rest."

In *Price v. Commonwealth*, 77 Va. 393, 395 the court said:

"It can never be made a means for depriving the prisoner of this presumption of innocence, as it inevitably will be if the courts and their officers are permitted to comment upon the failure of the accused to testify."

In *Powell v. Virginia*, 189 SE 433; 110 ALR. 90 the court held asking the production of original papers, which compelled the defendant to take the witness stand to repel an unfavorable reference from his refusal to do so invaded the defendant's constitutional rights and includes and compares the Fifth Amendment in its opinion.

In *Ruloff v. People*, 45 N. Y. 213, 221, 222 the Court said:

"The act may be regarded as of doubtful propriety, and many regard it as unwise, and as subjecting a person on trial to a severe if not cruel test. If sworn, his testimony will

be treated as of but little value, will be subject to those tests which detract from the weight of evidence given under peculiar inducements to pervert the truth when the truth would be unfavorable, and he will, under the law as now understood and interpreted, be subjected to the cross-examination of the prosecuting officer, and made to testify to any and all matters relevant to the issue, or his own credibility and character, and under pretence of impeaching him as a witness, all the incidents of his life brought to bear with great force against him. He will be examined under the embarrassments incident to his position, depriving him of his self-possession and necessarily greatly interfering with his capacity to do himself and the truth justice, if he is really desirous to speak the truth. These embarrassments will more seriously affect the innocent than the guilty and hardened in crime. Discreet counsel will hesitate before advising a client charged with high crimes to be a witness for himself, under all the disadvantages surrounding him. If, with this statute in force, the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself. The constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated.

"The Legislature foresaw some of the evils and dangers that might result from the passage of this act, and did what could be done to prevent them by enacting that the neglect of refusal of the accused to testify should not create a presumption against him." *Ruloff v. People*, 45 N. Y. 213, 221, 222.

In *Bruno v. U. S.*, 308 U. S. 287, 293, this Court said:

"But congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not fall against him."

And on page 294—"and when it is urged that it is a psychological impossibility not to have a presumption arise in the minds of the jurors against an accused who fails to testify, the short answer is that Congress legislated on a contrary presumption and not without support in experience."

The dissenting opinion in *Twining v. New Jersey* says:

"Can there be any doubt that at the opening of the War of Independence the people of the colonies claimed as one of their birthrights the privilege of immunity from self-incrimination? This question can be answered in but one way. If at the beginning of the Revolutionary War any lawyer had claimed that one accused of crime could lawfully be compelled to testify against himself, he would have been laughed at by his brethren of the bar, both in England and America. In accordance with this universal view as to the rights of freemen, Virginia, in its Convention of May, 1776 in advance, as it observed, of the Declaration of Independence—made a Declaration (drawn entirely by the celebrated George Mason) which set forth certain rights as pertaining to the people of that State and to their posterity 'as the basis and foundation of government.' Among those rights (that famous Declaration distinctly announced) was the right of a person not to be compelled to give evidence against himself." *Twining v. New Jersey*, 211 U. S. 78, 119, 120.

Lack of Fair Trial

In addition to the statute, however, under the considerations of our questions as a violation of due process of

law guaranteed by the 14th Amendment to the Constitution of the United States, we have another consideration of whether the accused has been accorded a fair trial. For a fair trial has always been held to be an essential requirement under the due process clause of the 14th Amendment to the Constitution of the United States. *Lisenba v. California*, 314 U. S. 219. This Court has said that a fair trial is denied to an accused when a confession obtained by third degree methods is introduced in evidence against him. *Chambers v. Florida*, *supra*; *Lisenba v. California*, *supra*. How much more unfair is it to convict an accused where the evidence as in this case is extremely weak and where the defendant's silence is testimonial evidence that he could not explain or deny (1) fingerprints; (2) alleged conversation regarding a purported offer of sale of a diamond ring; (3) the condition under which the deceased was found with stockings removed and three stockings tops found in his room. Thus silence is permitted to supplant the need for evidence and such proceeding is unfair.

Furthermore, when viewed in the light of the facts in the case the constitutional provision and statute permitting the prosecutor to comment as he did resulted in unfair trial and an unfair result.

Comments of Prosecutor

The prosecutor told the jury that he stood before them "in the capacity of a sworn officer of the law, a part of the district attorney's office, for the purpose of presenting the facts available to you intending to see that a proper verdict is arrived at" (R. 336).

Thus speaking in the name of the authority of the State, the prosecutor went on to tell the jury that there were 441 pages of testimony (R. 338) and later on that none of it was denied by the accused. The prosecutor told the jury that

Frances Jean Turner overheard the defendant say to another colored man in substance and ask this man "if he would be interested in buying a diamond ring." "No, he was not interested" (R. 333). Prosecutor said in reference to this: "The defendant has not taken the stand; he has not denied that; it is uncontradicted in the testimony. There he sits, not getting on the stand, not giving you what his version of the situation is. You have got the right, members of this jury, to consider the fact and consider that four hundred and some odd pages of testimony are uncontradicted from the lips of this defendant. Why? For example, during the time that Frances Turner was on the stand—it happened here in the courtroom—the defendant and his counsel went into a huddle, and then came up with some questions about a juke box. You remember that. He was there. That conversation happened. He has not denied it; it is uncontradicted" (R. 343-344).

Again we have comment about two pillows that were on top of the deceased when she was found. The pillows had the appearance of blood underneath. The prosecutor argues: "That in itself, with reference to the condition of those pillows there, appearing to be blood, indicate that the defendant had remained in that apartment for some considerable period of time; a considerable period of time; unquestionably those pillows were changed. Why, I don't know. The man over here knows, but he does not tell.³⁵ We have, in addition to the situation on the pillows—when I say a long period of time, that statement is corroborated by the

³⁵What evidence is there he knows and does not tell? None. It is left to be proved by the defendant's silence. It resembles trial by ordeal, which supplanted lack of proof. See Wigmore's *Kaleidoscope of Justice*, page 5. The theory is that a Divine or supernatural power can manifest to mankind the truth in controversy, and that it will do so when properly sought. Here the State supplants silence for the ordeal. Or should we call it the ordeal of Silence?

testimony of Mrs. May, the lady across the hall. Now, she is, you will recall, that afternoon seated on the divan, and then later on, I believe she said around 5:30 or 6 o'clock, she went to bed. She is not definite as to the time. Counsel read it from the transcript of the preliminary hearing, and I think her time was some place between 6:30 and 8:30; somewhere in that vicinity" (R. 348).

With reference to the stockings being taken off the body and the exposure of Mrs. Blauvelt's body, the prosecutor argued: "Mr. Brennan testified that that photograph was taken for the purpose of showing that the under-garments or pants that Mrs. Blauvelt had on were torn across the crotch. Now, by looking at People's Exhibit 34 you can see in that exhibit what appears to be a portion of a woman's garment used for the purpose of holding up the stockings. We know from the testimony that the stockings are taken off. We know that the shoes are off when the body is found. We know that the lower portion of her body, when the brown coat is removed, is entirely exposed up to the position that Mr. Brennan said. Now, the defendant has not explained that. He has not told you why. I would have liked to find out, if he had gotten on the stand, and I think you would have liked to have known why" (R. 350).

Again the prosecutor commented as follows: "Again he says, 'I will have my attorney and all my alibi witnesses there when the time comes.' Have you heard from the lips of the defendant or a single witness called by the defendant where he was other than in that apartment? If he had alibi witnesses that would testify, they would be up here testifying" (R. 367). A false inference was also permitted to be drawn by the jury regarding the defendant's failure to testify which involved the tops of three women's stockings identified as having been taken from the defendant's room and admitted over objections into evidence (R. 314-

315) (People's Exh. 35): One of the stocking tops was found on his dresser; the other two in the drawer of the dresser among other articles of apparel. The stocking tops were not all of the same color and at the end of each part away from what was formerly the top of the stocking a knot or knots were tied. None of the stocking tops from defendant's room matched with the bottom parts of the stockings found under the body of the deceased (R. 382). There was evidence that on the day of the alleged murder the deceased had been wearing stockings.

To allow the jury to draw a false and unwarranted inference that merely because the defendant had not testified that he had something to do with removing the stocking from the deceased is to permit false evidence in a trial to convict an accused.

The prosecutor argued regarding the stockings: "And when the body was removed underneath the body he found the foot portion of the stocking and that was introduced here in evidence. We placed in evidence three stockings found in the room of the defendant. From the appearance I think it is readily determined that they are women's stockings. They are tied at the top. We have the top part of the stocking Mrs Blauvelt had, missing, and the whole stocking she had on the other leg missing." Yet the evidence showed that none of these stockings were alike, nor were the same stockings. Yet the prosecutor continued:

"Going to some of the other testimony in this case, Mr. Pinker testified to making certain observations there and finding certain things at the scene. He is the witness that testified that he was there when the Coroner deputies removed the body, and when the body was removed, underneath the body he found the foot portion of this stocking, and that was introduced herein to evidence. We placed in evidence the tops of three stockings found in the room of

the defendant. From the appearance, I think it is readily determinable that they are women's stockings. They are tied at the top. We have the top part of the stocking that Mrs. Blauvelt had on, missing, and the whole stocking she also had on the other leg missing. Counsel on cross-examination of one of the witnesses—I believe it was Miss Massey, one of the women that saw her on that date, last saw her alive, and asked her if she was wearing stockings, and she said she was. The defendant has not seen fit to explain what these stockings are doing in his room. It is rather an unusual situation where we find stockings gone and three women's stockings in the room of the defendant.

* * * At least, we have those in the possession of this defendant. No explanation; nothing said or testified by him as to what they are doing in his room. The record is silent" (R. 346)→

Again the prosecutor commented as follows:

"Counsel asked this question: 'The defendant may or may not take the stand'—you remember that—'In the event he does not take the stand, will you view that in the light of the presumption of innocence?' You were asked this question by myself: If the court instructs you that you can consider the fact of the failure of the defendant to take the stand, his failure to explain or deny anything, if you would do that, and you said you would. Now, the defendant does not have to take the stand in any case. He didn't take it here. He did not call, however, any witnesses. He tells the officers, 'I will have my alibi witnesses.' Where are they? Where are they? You know what stopped him. Those fingerprints; those fingerprints. Not one single witness did they call to the stand. You heard yesterday, 'The People rest,' and the defendant said, 'The defense rests.' I say, why didn't they have them? The reason is, finger-

prints; powerful evidence. So far as this defendant is concerned, as I said before, he does not have to take the stand. But it would take about twenty or fifty horses to keep someone off the stand if he was not afraid. He does not tell you."

The district attorney also made the following comment on the law:

"Counsel, in starting out, tells you about the presumption of innocence and the doctrines of reasonable doubt. He says that the defendant is clothed with the presumption of innocence. . . . And here we started out in this case with the defendant, as counsel says; clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand or did not put any witnesses on the stand, he stood here with that presumption removed, based on the evidence in this case. . . . If there is any mystery that has occurred in this case, it is a mystery from the defense side of this case. Did the defense clear up any mystery? The answer to that is 'No' " (R. 369-370).

Another argument on the defendant's failure to take the stand follows:

"Then counsel says, if the defendant wasn't there, what has he got to tell you? He says, 'If he wasn't there, what has he got to tell you?' Well, there are a lot of things he could tell us. If he wasn't there, where was he? Where was he? Was he by himself or was he with somebody? Where are these alibi witnesses he talked about? He could explain how his prints got on there, and he could explain what he was trying to do when he was selling or attempting

to sell a diamond ring. He could have done that. Neither he nor witnesses did it. Those are matters which all have been testified to and are here in this case" (R. 372).

Again the prosecutor commented: "Now, the defendant does not say, from the witness stand here, 'I put my prints on the door there at the preliminary'; and he does not say, 'I put my prints on there at the police station'" (R. 376).

And in conclusion the prosecutor said: "Well, I again repeat the statement I made this morning: that this defendant had the right to take the witness stand; it is a privilege afforded to him, and he did not do it. You can consider that with all the testimony in this case, and I ask you to consider it..

"In conclusion, I am going to just make this one statement to you: Counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty'? Not one word from him, and not one word from a single witness. I leave the case in your hands" (R. 379).

The above comments were made in a case of circumstantial evidence.

Compare the comments of the California prosecutor, permitted by the California laws under attack and approved by the California courts with the following comments in the *Twining v. New Jersey* case by the court;

Page 98 *et seq.*, Original Record No. 10, October Term, 1908.

The Court:

"Now that meeting was held or not.

"That paper says that at this meeting were present among others, Patterson, Twining and Cornell.

"Mr. Patterson has gone upon the stand and has testified that there was no such meeting to his knowledge; that

he was not present at any such meeting, and that he never acquiesced, as I understand, in any way, in the passage of a resolution for the purchase of this stock.

Now Twining and Cornell, this paper says were present. They are here in Court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.

Now it is not necessary for them to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any obligation. It is simply a right they have to go upon the stand, and consequently the fact that they do not go upon the stand to contradict this statement in the minutes they both denying through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

On page 102-103 the court further charged the jury:

"Now gentlemen, if you believe that this is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testi-

mony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt Cornell is guilty. And yet he has sat here and has not gone on the stand to deny it. He was not called upon to go upon the stand and deny it; but he did not go upon the stand and deny it, and it is for you to take that into consideration.

“Now, Twining has also sat here and heard this testimony, but you will observe there is this distinction as to the conduct of these two men in this respect: the accusation against Cornell was specific by Vreedenberg in this respect. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say ‘Well, I don’t think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it because Vreedenberg is uncertain as to whether I was there; he won’t swear that I was there.’ So consequently the fact that Twining did not go upon the stand can have no significance at all.

“You may say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him.”

We are not concerned here with mere error of the California prosecutor but with a series of comments which the Constitution and statute of the State of California apparently authorized the prosecutor to make and which are the

application by him of the statutory authority and which were made pursuant to that constitutional and statutory provision but which shock the conscience of justice, and deprive one of liberty without due process.

Prior to 1934 such comment would have been reversible error. *People v. Tyler*, 36 Cal. 522. It was only pursuant to the authority of the Constitution and statute that the prosecutor was thereafter able to make the comments that he did.

The California Supreme Court considered the claim that this statute inherently and as applied in this case violated the 14th Amendment of the Constitution of the United States and held against that claim. The California Court said:

"The practical effect of the 1934 amendment may be that many defendants who otherwise would not take the stand will feel compelled to do so to avoid the adverse effects of the comments and consideration authorized by the amendment. Such a coercive effect, however, is sanctioned by the amendment, which, being later in time, controls provisions adopted earlier" (R. 385).

Defendant's Failure to Testify replaces Essential But Missing Evidence

"It appears from the evidence that defendant could reasonably be expected to explain or deny all evidence presented. Thus the jury could infer from the evidence concerning the fingerprints either that defendant handled the garbage compartment door in the perpetration of the burglary and murder or that they were placed there at some other time. The defendant could reasonably be expected to know whether or not he had handled the garbage door and if so, on what occasion. The evidence that he solicited someone to buy a diamond ring is susceptible of an inference either that he was attempting to sell the victim's rings

or rings that had no connection with the crime. The defendant could reasonably be expected to know whether or not he had done such soliciting and, if so, with regard to what rings. His failure to explain or deny this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable" (R. 389).

Thus the defendant's silence supplants the lack of proof by the State."

The State based its denial of petitioner's claim upon authority of *Twining v. New Jersey*, 211 U. S. 78 (R. 386), but this decision overlooks three phases of the *Twining* case. First, that in the *Twining* case the decision was unnecessary to the facts of that case, and second, that the case was one of direct testimony and not of circumstantial evidence and did not involve a statute, such as here, which permits the court and prosecutor to comment on the failure of the defendant to explain or deny personally by his testimony any facts against him. In the *Twining* case the comment was by the court and there, too, the court, so far as *Twining* was concerned, stated that he did not personally need to go on the stand and deny the charges against him. Nor would the

* There have been several practical objections to the proposal to substitute comment of the prosecutor for substantial evidence. One of these objections is akin to the objections by the Wickersham Commission in 1936 to the use of "third degree" evidence out of helpless prisoners. That method, said the Wickersham Commission, made police officers lazy in their quest of competent evidence. The same objection has been voiced to the statutes. It is said that prosecutors will rely either upon their ability to extort a confession on the witness stand or in the absence or failure to take the stand they can effectively argue the fact of testimonial silence to the jury as proof of defendant's guilt. Thus, it will not be necessary for prosecutors to get competent or sufficient evidence at all. They can rely upon shifting the burden to the defendant to defend himself or upon the failure of defendant to testify to buttress their case against the insufficient or incompetent or irrelevant evidence.

fact that he did not take the stand personally be considered against him. The court's instructions were very limited and did not compel the defendant to take the witness stand. Neither did the court's comment result in an inference in that case which might have been false because of a situation, such as here, where Adamson could not take the witness stand because of a prior conviction of felony. Here the statute admittedly amounts to testimonial compulsion. While there has been some comment in the brief of the respondent, State of California, that other decisions support the *Twining* case in their comment, none of the other decisions or cases involve, as here, a question of a statute which amounts to testimonial compulsion nor do any of those cases involve compulsory self-incrimination. The case of *Snyder v. Massachusetts*, 291 U. S. 97, involved merely the right of showing place of an offense when the defendant does not accompany the jurors to the scene of the crime. *Palko v. Connecticut*, 302 U. S. 319, involved merely the right of a state to retry an accused a second time and convict him of murder after the State had appealed the decision. No other case since *Twining v. New Jersey*, *supra*, in this Court has involved the great immutable principle of justice that an accused should not be compelled to testify and no case has involved a statute, such as here involved which says that the jury may consider the defendant's failure to take the stand as a fact against him.

We respectfully submit that "The due process clause of the 14th Amendment withdrew the freedom of a state to enforce its own notions of fairness in the administration of criminal justice" where "in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental and that the right against testimonial compulsion in a free republic whether it consists in the seizure of a person or of a document or the extorting of testimony" has been offensive

to the free spirit of an American, to the free spirit of an Englishman and objectionable except where despotic power reigns."

These matters offend principles of justice inherent in our American Government and violate standards of decency universally accepted in this country, and-so far always thought to be an inalienable right of an American

Through "the gradual process of judicial inclusion and exclusion" this Court has given accused defendants the right and protection of counsel of his own choice, adequate time to prepare for a defense, freedom from the use of extorted confessions and safeguards against double jeopardy and cruel or unusual punishment. But of what avail is the protection of counsel if counsel is put to the difficult task of advising an accused who has suffered a previous conviction of a felony? To take the witness stand would mean to expose his past and result in conviction but not to take the witness stand would mean that the prosecutor could use the very fact of silence in the courtroom as a fact of guilt.

Of what avail is it that able counsel should appear in the courtroom in behalf of an accused and yet be unable to explain away the silence of the defendant and the state statutory and constitutional provision of having the jury consider the defendant's silence as proof of facts otherwise left unproved in the case? His most brilliant oratory, his most convincing arguments, his most subtle reference, his most careful pulls at the heartstring or appeals to reason, all go for naught when the prosecutor says, as in the present case, "Counsel asked you to find this defendant not guilty, but does the defendant get on the stand and say under oath 'I am not guilty,'" or where the prosecutor says "Counsel asks you to do for the defendant what he does not do for himself, tell you he is not guilty."

The Prosecutor's Argument: The Defendant's Requested Instructions to Cure the Error Refused. Cases Cited

During oral argument Mr. Chief Justice Vinson asked counsel for authorities to the effect that a requested instruction to the jury under California practice would cure any error or misconduct committed by the district attorney in his comments or was sufficient under California practice. See *People v. Tyler*, 36 Cal. 522. Further authorities in response to this request are as follows: *People v. Mayen*, 188 Cal. 237, 259. The court said (188 Cal. 257): "The specifications of misconduct of the counsel for the prosecution representing the district attorney's office had some foundation. There were repeated comments of the prosecuting officer which were open to censure. For the most part the court corrected them by instructions to the jury." Again on p. 259 the court said: "Neither was there anything in the instructions to indicate to the jurors that they should not consider to his prejudice the failure of the defendant to testify." In *People v. Tedesco*, 1 Cal. 2d 211, 221, where the prosecutor commented on the failure of the defendant to take the witness stand, the court said: "The jury was advised in the charge that if the defendant in a criminal case does not testify, failure to do so shall not be taken as a circumstance against him. We, therefore, find no error." In *People v. McCarthy*, 115 Cal. 255, 262, the court said: "It is found suggested in *People v. Schmitt*, supra, that the instruction was evidently given to correct an erroneous suggestion made in the argument of counsel and for that purpose was proper." In *People v. Schmitt*, 106 Cal. 51, the court gave an instruction in the charge to the jury to correct a mistake of the district attorney. He held that the proper time to do so was in his charge to the jury.

³⁶ The petitioner's requested instructions were refused.

In *People v. Kynette*, 15 Cal. 2d 731, the defense counsel asked the trial court to instruct the jury as to the effect, if any, of the refusal of witnesses to testify. The court instructed the jury, which instruction the appellate court held cured the error.

See also *People v. Glass*, 158 Cal. 650. In *People v. Williams*, 32 Cal. 280, 287, the court said: "It will rarely fail to happen that subjects for instruction, not previously thought of, will be suggested or occur to counsel pending the argument or after its close; and as one of the objects of giving instructions is to present the law of the case fully, and not partially, it would hardly be consistent with that object to refuse matters of perhaps vital importance merely because they did not occur to counsel at or before a given stage in the proceedings, and if such was the case here we should feel inclined to hold an error, as being an abuse of discretion." Independent of rules a party would have a right to submit his instructions at any time before the jury left the box. In *People v. Sears*, 18 Cal. 635, the court said: "It is true that injustice may be done a defendant in some cases by refusing to consider instructions because not offered before the argument, since such instructions may be necessary in consequence of the propositions or argument of the prosecuting attorney. In such cases the court should either give the instructions of defendant or make such explanations of his own as would put the law correctly before the jury." In *People v. Dukes*, 16 Cal. App. 2d 105, 110, the defendant has in the case at bar offered an instruction to the jury regarding defendant's failure to take the witness stand and told the jury that not the slightest presumption of guilt is raised against the defendant by reason of the fact that he has not taken the witness stand. The California court held that: "The instruction, if given, would have in effect told the jury not to consider that which the con-

stitutional amendment authorized it to take into consideration (referring to Art. I, Sec. 13 of the Constitution, as amended in 1934, and Sec. 1323 of the California Penal Code)."

In California Penal Code, Sec. 1127, it is stated that ". . . Either party may present to the court any written charge on the law but not with respect to matters of fact and request that it be given if the court thinks it correct and pertinent; if not, it must be refused. Upon each charge presented and given or refused the court must endorse and sign its decision." * * * Sec. 1259 of the Penal Code provides: ". . . 1259: The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court if the substantial rights of the defendant were affected thereby."

Even without any instructions being offered, it is the rule in California that "Where an examination of the entire record fairly shows that the acts complained of are of such a character as to produce an effect which as a reasonable probability could not have been obviated by any instruction to the jury, then the absence of such assignment and requests will not preclude the defendant from raising the point in this court." In *People v. Podwys*, 6 Cal. App. 2d 71, the court there held that the district attorney was guilty of serious misconduct in the argument to the jury which was persistent, amounting to a course of conduct throughout the trial and that a fair and impartial trial was not had for that reason. See also *People v. Adams*, 14 Cal. (2) 154, 162; *People v. Tyler*, 36 Cal. 522; *People v. Wells*, 100 Cal. 459, 465; *People v. Stafford*, 108 Cal. 26; *People v. Simon*, 80 Cal. 675, 679; *People v. Edgar*, 34 Cal. 459, 469; *People v. Shears*, 133 Cal. 154.

The defendant offered a series of instructions designed to cure the prosecutor's comments on this failure personally

to testify or explain by his testimony the evidence against him (R. 390). Thus, the defendant offered an instruction that "You are instructed that it is the policy of the law to zealously protect the innocent. In a criminal case the law clothes the defendant with a presumption of innocence and casts upon the people the burden of proving guilt beyond a reasonable doubt. The defendant is not obliged to prove his innocence or offer any proof thereon, and if the defendant elects not to take the witness stand but to rest upon what he believes to be the weakness or insufficiency of the People's case, he has a right to so do and no inference or presumption of guilt arises from his failure to take the witness stand."

"You are instructed that the burden of proof rests on the prosecution and the failure of the defendant to take the stand raises no presumption or inference of guilt." These instructions, if given, would have cured the mere error of the prosecutor insofar as one or more of his comments were concerned and under California practice the request for an instruction was a proper method to cure any misconduct on the part of the prosecutor. There were many other instructions offered and refused which are contained in the opinion and in the record (R. 390, 391).³⁷ Many others were offered and refused.

³⁷ In the case of *Greenberg v. The People of the State of California*, No. 466, October Term, 1946, now pending in this Court, the defendant, Greenberg, was tried on the identical statute and constitutional provisions as in the present case before the same Court and judge with the same instructions offered and with repeated objections to the prosecutor's comments on the failure of the defendant to explain or deny personally by his testimony any of the evidence against him. Greenberg did not take the stand. He, too, has suffered a prior conviction. The Trial Court overruled the objections and denied the claims under the 14th Amendment, including the claim of the prosecutor's misconduct because of his comments on the failure of the defendant personally to explain or deny the testimony against him. The California District Court of Appeals, based upon the Adamson decision, affirmed that judgment also and an appeal was allowed to this Court.

We are not dealing here alone, however, with mere error in the prosecutor's comments to a jury but with a state constitutional provision and a statute of the state which give the prosecutor the right to comment on the failure of the defendant personally to explain or deny by his testimony any evidence against him inherently and as construed and applied in the instant case, and the fact of the defendant's silence, as thus commented on, may be considered by the jury.

In *Mooney v. Holohan*, 294 U. S. 103, the Court said: regarding claimed misconduct by the use of perjured evidence by the prosecutor: "Reviewing decisions relating to due process, the Attorney General insists that the petitioner's argument is vitiated by the fallacy 'that the acts or omissions of a prosecuting attorney can ever, *in and by themselves*, amount either to due process of law or to a denial of due process of law.' The Attorney General states that if the acts of omissions of a prosecuting attorney 'have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusation against him, then such acts or omissions of the prosecuting attorney may be regarded as *resulting* in a denial of due process of law.' And, 'conversely,' the Attorney General contends that 'it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied.'

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation

through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Hebert v. Louisiana*, 272 U. S. 312, 316, 317. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State 'whether through its legislature, through its courts, or through its executive or administrative officers.' " *Mooney v. Holohan*, 294 U. S. 103, 111, 112, 113.

What difference is there in deceiving a jury by perjured evidence and deceiving it by claiming that the defendant is guilty because he does not take the witness stand when the real reason is that the defendant has been convicted of a prior felony and cannot expose his past?

The statute permits the prosecutor to argue on a false premise that the defendant is guilty because he did not take the witness stand and permits the jury to consider that false premise as the reason for the defendant's silence in the courtroom. Such a statute which permits a false argument or false conclusion to be reached offends standards embodied in the fundamental conception of justice which lie at the base of our civil and political institutions. *Hebert v. Louisiana*, 272 U. S. 312, 316, 317; *Mooney v. Holohan*, 294 U. S. 103.

Such a statute inherently "violates standards of decency more or less universally accepted" or offends "immunities implicit in the concept of ordered liberty" or offends a principle of justice "practiced in the traditions and conscience of our people" or repugnant "to the conscience of mankind," phrases used by Mr. Justice Frankfurter in *State of Louisiana v. Resweber*, No. 142, Oct. Term, 1946. In other words "due process of law" is a standard, and without defining it, we know that it must not be repugnant to standards of ordered liberty or offend principles of justice practiced in the traditions and conscience of our people or repugnant to the conscience of mankind.

Does a statute which amounts to a backdoor compulsion of a defendant to testify and which the State of California recognizes in its practical effect compels the accused "to do so to avoid the adverse effects of the comments and consideration authorized by the amendment" (R. 385) violate the standards of decency more or less universally accepted in the United States of America?

Even before our nation was formed, the star chamber method of inquisition was abolished. The provision against compulsory testimony of any character was forbidden in England and became deeply enrooted in the common law. *Boyd v. United States*, 116 U. S. 616, which has been repeatedly reaffirmed by this Court, re-enunciated this sound principle at length. 42 of the 48 states wrote into the state constitutions the provision of the 5th Amendment to the Constitution of the United States, thus expressing an almost universal standard of decency in regard to criminal trials throughout the United States. For equally with the responsibility of safeguarding the fundamental principles of justice and liberty that inhere in our institutions with the courts are those of the state legislatures of the various states of the Union. This expression by each of them of the

principle which the Federal Government had incorporated in its 5th Amendment is but a universal expression of common decency. Furthermore, it has been one of the immutable principles of justice which inhere in the very idea of free government, *Holden v. Hardy*, 169 U. S. 366, 389, that no accused should be forced to testify and in no state at the present time do we know of such a case where the accused can be called to the witness stand by the prosecution. The California constitutional provision and the statute, though, compel him to testify or suffer inferences of guilt for failure to do so. This offends the principle of justice 'rooted in the traditions and conscience of our people' that no accused shall be compelled to testify or that if he fails to do so a presumption or inference of guilt arises against him."

This Court has said that it is "repugnant to the conscience of mankind" to permit officers of the state to take an accused and extort a confession from him in a jail, *Chambers v. Florida*, 309 U. S. 233, or in some private place, *White v. Texas*, 310 U. S. 530, 533; *Lomax v. Texas*, 313 U. S. 544; *Canty v. Alabama*, 309 U. S. 629; *Vernon v. Alabama*, 313 U. S. 547, or under a host of other circumstances and situations which this Court has had occasion to condemn as violative of the 14th Amendment. The California statutes substitute the place of compulsion as that of the courtroom. The opinion of the Supreme Court of California admits that the statute has a form of compulsion. Justice Jackson in oral argument used the expression that it puts "the heat" on the defendant to testify. This might be characterized as "statutory heat" replacing the club, the fist, the bludgeon, the rubber hose.

The only difference is that instead of being wielded in the seclusion of a cell by a furtive minion of the law it is administered in open court with the defendant and his counsel sitting helplessly by, while the heat is legally applied by the state's District Attorney aided and abetted

by the judge in his stately black and somber robe. I say legally, if this constitutional provision is permitted to stand. It says you get on the witness stand and subject yourself to questioning of a clever prosecutor who is prepared to shriek you to pieces, very much like the star chamber methods which were disapproved in England and the earlier ecclesiastical courts. The statute says, in effect, if you don't do so there is a presumption or inference of guilt which the jury has a right to consider from the mere fact of silence in the courtroom.

Thus, you are damned if you do and you are damned if you don't.

But if this Court's "minds rebel against permitting the same sovereignty to punish an accused twice for the same offense," *State of Louisiana ex rel. Willie Francis v. Resweber*, No. 142, Oct. Term, 1946, then this Court's mind should equally rebel against removal of an equivalent constitutional guarantee equally sacred and expressed in the same Constitution.

Construction of the Statute by the State

We come then next to the question of *construction* of the California statutes in this case.

The California Court considered the statute inherently and as construed and applied in this case upon our challenge in that court. Upon motion for a new trial (R. 32) in the trial court and in the Supreme Court of the State of California, both in its hearing and on rehearing (R. 394), the California Court held that pursuant to the constitutional provision and the statute the defendant "in any criminal case whether the defendant testifies or not his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the jury.

The construction and application, therefore, of the statute permits a jury to consider as evidence in the case testimonial silence in the courtroom as a fact for it to consider in reaching its verdict and was permitted to do so in this case.

When does the silence of the accused become proper for consideration?

The prosecution puts in all its evidence at which time the accused asks for an advised verdict. If the prosecution has failed to make out a *prima facie* case the defense is entitled to an advised verdict. The silence of the accused in the courtroom is no part of the people's case up to this point.

If it becomes proper for consideration thereafter it is testimony extorted from the defendant in the courtroom, and if there are two reasonable theories that can be given to the evidence, one of innocence, and one of guilt, the rule of law that the jury must accept that one of innocence and reject the one of guilt is outweighed and tilted to say that the jury shall accept that of guilt if the defendant fails to testify.

Mr. Justice Reed asked the question in the course of oral argument as to just what additional fact is proved or established by the silence of the accused or what additional fact or inference might the jury consider by reason of the silence of the accused. The answer is that several things are considered by the jury by the reason of the mere silence of the accused.

The California Court says;

"It appears from the evidence that defendant could reasonably be expected to explain or deny all evidence presented. Thus the jury could infer from the evidence concerning the fingerprints either that defendant handled the garbage compartment door in the perpetration of the burglary and murder or that they were placed there at some other time. The defendant could reasonably be expected,

to know whether or not he had handled the garbage door and if so, on what occasion. The evidence that he solicited someone to buy a diamond ring is susceptible of an inference either that he was attempting to sell the victim's rings or rings that had no connection with the crime. The defendant could reasonably be expected to know whether or not he had done such soliciting and, if so, with regard to what rings. His failure to explain or deny this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable" (R. 389).

Thus the failure of the prosecutor to prove when or how any fingerprints got on the door was supplanted by the argument to the jury and in the inferences which the jury were permitted to draw and approved by the court's opinion by the mere failure of the defendant to take the witness stand. There was not one scintilla of evidence to show that accused had murdered Mrs. Blauvelt or that he had ever laid a hand on her or injured her or taken any jewelry from her or been in the apartment three to five hours after the alleged attack. As a matter of fact, it is hard to believe any such thing occurred. Yet the California court permits the jury to infer from the mere failure of the defendant to take the stand what the prosecutor failed to be able to prove.

Thus the presumption of innocence is overcome by testimonial silence in the courtroom.

The California Court says "defendant could reasonably be expected to know whether or not he had handled the garbage door and if so, on what occasion." The prosecutor never proved time, place, or circumstances of the defendant having handled the door and the testimony of the police and sheriff's experts showed marked dissimilarities in the defendant's actual fingerprints with those allegedly found

on the door by the sprinkling of a powder. Yet the jury was given the authority to presume the defendant's guilt of murder beyond a reasonable doubt on this slim evidence.

The California Court further says: "The evidence that he solicited someone to buy a diamond ring is susceptible of an inference either that he was attempting to sell the victim's rings or rings that had no connection with the crime." Of course, the evidence relating to the question of the ring is merely a purported statement which it is alleged the accused made to someone in the Colony Club about a ring with no showing that it had any relationship whatsoever to any ring of the deceased or that there ever was such a ring. Nevertheless, the California court construes the statute to authorize the jury to presume the guilt of the defendant and that this was the ring in question because the defendant's "failure to explain or deny this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable" (R. 390). Yet the court recognizes that the defendant's failure to take the witness stand could have been logically and properly explained because of his prior convictions of felony which would have been exposed to the jury had he taken the witness stand. The court admits that "Since fear of this result is a plausible explanation of his failure to take the stand to deny or explain evidence against him, the inference of the credibility and unfavorable tenor of such evidence that arises from this failure is definitely weakened by this rule of impeachment." This weakness, however, could not be revealed to the jury by counsel or court without prejudicing the defendant through the revelation of past crimes. Court and prosecutor are left no alternative but to comment on defendant's failure to deny or explain evidence against him as though the sole reason for

his silence was that he had no favorable explanation. Any change in the law in this respect, however, must be made by the Legislature" (R. 393).

We respectfully differ. We think that it is a violation of due process of law for a statute to permit a false inference of guilt to arise and to permit argument to go to a jury that a defendant is guilty because he fails to take the witness stand where the *real reason* for his failure to take the witness stand may be the fact that he has suffered *previous conviction or convictions* of felony.³⁸ Such a presumption or inference is arbitrary and since it is possible to lead a jury to a false presumption or inference or conclusion and did in this case such a proceeding should not be permitted any more than the use of a false confession, or perjured testimony forbidden by this Court in its illustrious decisions of *Chambers v. Florida*, 309 U. S. 227 or *Mooney v. Holohan*, 294 U. S. 103.

Is it not fraudulent concealment authorized by statute to permit comment on the failure of the defendant to take the witness stand as proof of guilt when the judge and prosecutor both know the defendant has suffered a prior conviction of felony and that is most likely the true reason for the defendant's failure to take the stand?

• Further Evidence of Unfair Trial

The further elements of *unfair trial* in this case unanswered by the State are shown by the paucity of evidence that the defendant murdered the deceased. Stella Blauvelt, aged 64, was found dead in her apartment on July 25, 1944. She had apparently been dead a day and a half when she was found with her face upward covered with two blood-stained pillows. She still wore her wristwatch and a box

³⁸ The defendant in this case suffered from prior felonies twenty-four years and seventeen years before.

containing jewelry was still in the apartment. It was claimed that various people had seen her within a day or two prior to the date of her death wearing two diamond rings on her left ring finger and a gold band thereon. The gold band was still on the finger but those searching the apartment said they did not find the diamond rings. The last witness that saw her the day she was found did not observe the rings. Mrs. Blauvelt, when found, had her dress up around her waist with her panties showing. The panties were torn at the crotch "that is, the crotch was torn out and laid up over the top of the dress" (R. 304). There were a number of rings, costume jewelry, cheap rings, light green settings, etc. but no diamond or white stone rings about the place (R. 306). The pocketbook was opened and it had a small coin purse right at the entrance of it which appeared to be empty. The articles from the pocketbook were strewn on the chair (R. 308). There was a garbage disposal door in the kitchen (R. 6). This door, it was claimed, had some fingerprints on the inside of it. The fingerprints were not visible but latent and powder was spread over the door and photographs taken of the prints. The police officer fingerprint man testified that the prints on the inside of the door represented prints of the right ring and the little finger of the right hand and the left index, middle, and ring fingers of the left hand and one finger print on the back side of the door as the middle finger. The police experts admitted that there were many points of dissimilarity (R. 223-224) that the fingerprints actually taken of the defendant were "almost twice as wide" and the cores of the fingerprints appear different (R. 224). On the left print there is a little white section with a dot in the middle which does not exist on the door and the witness testified that he had explanations for the differences; one of these explanations was that the time difference between the time

that the fingerprint was left on the door and the time it was photographed "why anything could have happened" (R. 225). And he admitted that his explanations for the differences and similarities was based upon "guess and speculations as to the reasons therefor" (R. 225). There was no evidence as to the time or manner in which the fingerprints got on the door. There was not one scintilla of evidence that the defendant had murdered the deceased. Nothing whatsoever connected him with the actual murder. When Mrs. Blauvelt's body was found, her stockings were off and she had no shoes on. After the defendant was arrested a month later officers went to his room and found the tops of three women's stockings but these stocking tops, it was admitted, were not the same color or type as those found in Mrs. Blauvelt's room. Nevertheless, the prosecutor argued about these stocking tops as though that was evidence that connected the defendant with the crime of murder of the deceased. This constitutes the evidence of guilt from which no logical conclusion can be drawn that the accused was guilty beyond a reasonable doubt and to a moral certainty. Testimonial silence was therefore the basis of the jury's illogical and unwarranted verdicts of guilt arrived at in this way. This violated procedural due process.

Article I, Section 13, California Constitution and Section 1323 California Penal Code Unconstitutionally Shift the Burden of Proof and Create an Arbitrary Presumption of Guilt and Therefore Violate the Fourteenth Amendment to the United States Constitution.

The statute is further unconstitutional and in violation of due process of law because it shifts the burden of proof to the defendant and permits an arbitrary presumption of guilt to flow from the failure of the defendant to explain

or deny by his testimony any of the evidence against him. The statute shifts the burden of proof once the state has introduced evidence of the offense and even though the possible connection is slight or none at all and proof is unsatisfactory or entirely lacking as in the instant case it then shifts the burden to the defendant to explain or deny personally the testimony which has been introduced. This has been held to be unconstitutional. *Morrison v. California*, 291 U. S. 290; *Tot v. United States*, 219 U. S. 463, 467:

Furthermore the presumption of guilt which flows from the failure of the accused to take the witness stand is an *arbitrary presumption*. The rational connection between the failure of the accused to deny or explain alleged incriminating evidence and inference and unfavorable tenor that these provisions permit the jury to draw are arbitrary and not rational. Many reasons other than lack of power to explain favorably or to deny such evidence—for example, fear of disclosure to the jury of prior crimes such as impeachment, (Cal. Code of Civil Procedure; Sec. 2051^{37a} or fear of creating a bad impression by being a "poor witness" even lawyers suffer from this fear. *Hickman v. Taylor*, No. 47, Oct. Term, 1946, or lack of knowledge of anything that may be able to clear up the case may prevent an accused from taking the witness stand as said in *Wilson v. United States*, 149 U. S. 60. There are many reasons why an accused may fail to take the witness stand. The California Court con-

^{37a} If a person who has suffered a prior conviction of crime takes the witness stand, evidence of the prior conviction comes before the jury, but if the defendant does not take the stand that fact cannot be brought out if the defendant prior to trial admits his prior conviction of felony outside the presence of the jury. Section 1025 California Penal Code. Thus the statute (1025 P. C.) offers an attractive reason to keep off the stand if one has suffered a prior conviction of felony while Article I Section 13 then permits the State to argue from that fact that the jury should consider it as evidence of guilt.

cedes that "It is true that defendants convicted of prior crimes often do not take the stand because of fear that upon cross-examination their criminal record will be given to the jury." (R. 293). Yet it permits an arbitrary presumption of guilt to flow that the reasons the defendant has not taken the witness stand upon cross-examination his past record will be exposed to the jury. Such an arbitrary presumption for any reason offends the due process clause of the 14th Amendment of the Constitution of the United States.

Thus in the present case inherently and as construed and applied the jury was permitted to presume the guilt of the defendant to first-degree murder though no evidence arising above the dignity of suspicion connected him with the murder itself.

In addition to the lack of fair trial which we have shown as flowing from the silence of the defendant resulting in testimony we have also urged as unfair and in violation of due process of law the introduction of evidence and the argument thereon of the irrelevant stocking tops found in the defendant's room but in no wise connected with the stockings of the accused. This evidence was introduced against this poor Negro with the idea of inflaming the passions and prejudices of the jury. As the California Court points out, "None of the stocking tops from defendant's room matched with the bottom part of the stocking found under the body." Yet the prosecutor telling the jury that he stood before them in the capacity of a sworn officer of the law, as a representative of the State, urged upon the jury that the possession by the defendant of stocking tops not the same as those found underneath Mrs. Blauvelt coupled with the defendant's silence and the fact that "Defendant has not seen fit to explain what these stockings are doing in his room," inflamed the passions and prejudices

of the jury. Irrelevant evidence of this character like the fatal drop of poison in a whole barrel of water so taints and affects the water as to make it unfit to stand or use and so the fatal drop has infected the fairness of this trial. While we have urged that the procedure and proceedings offended due process of law which requires not that the results be right but that the proceedings be fair and just to an accused, we have also urged that this statute inherently and as construed and applied in this case violate the privileges and immunities clause of the 14th Amendment.

We are not unmindful of the decisions of this Court which have defined privileges and immunities of national citizenship, such as the right to go freely from one state to another, the right to vote; the right to carry on business, and other rights and privileges which have been held to be incidents of and characteristics of our national citizenship.

The Constitution does not name them specifically, nor exclude any particular one.

Nevertheless, we assert that if our right to travel freely from state to state is one of the fair incidents of national citizenship equally with it should be the right when one gets there to be free from testimonial compulsion in the criminal court and free from having one's oath and one's testimony extorted. In other words, we think this is the right of an American citizen everywhere and that coupled with his right to travel freely and to vote freely, is the right of a free citizen not to be seized and compelled to testify against himself.

This is so explained in the Preamble of our great American Constitution that "We, the People of the United States, in Order to form a more perfect Union" and "secure the Blessings of Liberty to ourselves and our Posterity,"—these words are but empty shibboleths if we may be compelled to accuse ourselves even though we are American citizens. The right to be protected in our personal liberty

in the courtroom is as equally as great as the right to be protected in our travel or in our business.

In *Boyd v. U. S.*, 116 U. S. 616, 635 this court said:

" . . . but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

"It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

This Court has further said in lasting words:

"Today, as in ages past, we are not without tragic proof that the exalted power of some governments (to punish manufactured crime dictatorially is the handmaiden of tyranny. Under our system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are nonconforming victims of prejudice and public excitement. Due process of law preserved by all for all by our Constitution commands that no such practice as that disclosed by this record shall send any accused to his death" *Chambers v. Florida*, 309 U. S. 235, 236.

We therefore pray for reversal of the judgments.

Respectfully submitted,

MORRIS LAVINE,
Attorney for the Petitioner.

SUBJECT INDEX

PAGE

Opinion below	1
Jurisdiction	1
Statement	2
Summary of argument	7
Argument	8
Introduction	8

I.

The right given by a state to court and counsel to comment upon defendant's failure to explain or deny any evidence or facts against him does not violate the Fourteenth Amendment to the Constitution of the United States	9
---	---

II.

The admission in evidence of portions of women's stockings found in appellant's room and not belonging to deceased did not deny appellant due process of law	24
Conclusion	27

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Boyd v. United States, 116 U. S. 616.....	19
Brown v. Walker, 161 U. S. 591.....	19
Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716	26
Counselman v. Hitchcock, 142 U. S. 547.....	19
Feldman v. United States, 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1046.....	17
Hale v. Henkel, 201 U. S. 43.....	19
Johnson v. United States, 318 U. S. 189, 63 S. Ct. 549, 87 L. Ed. 704.....	19
Lisenba v. People of the State of California, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166.....	25
McFarland v. American Sugar Co., 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 904.....	22
Morrison v. People of the State of California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 672.....	22
Palko v. State of Connecticut, 302 U. S. 218, 58 S. Ct. 149, 82 L. Ed. 288.....	18
People v. Amaya, 44 Cal. App. (2d) 656, 112 Pac. (2d) 942.....	11
People v. Beckhard, 14 Cal. (2d) 690, 96 Pac. (2d) 794.....	11
People v. Boggs, 12 Cal. (2d) 27, 82 Pac. (2d) 368.....	11
People v. Byers, 8 Cal. (2d) 676, 55 Pac. (2d) 1177.....	11
People v. Cowan, 44 Cal. App. (2d) 155, 112 Pac. (2d) 62.....	11
People v. Dozier, 35 Cal. App. (2d) 49, 94 Pac. (2d) 598.....	11
People v. Dukes, 16 Cal. App. (2d) 105, 60 Pac. (2d) 197.....	11
People v. Harsch, 44 Cal. App. (2d) 572, 112 Pac. (2d) 654.....	11
People v. King, 40 Cal. App. (2d) 137, 104 Pac. (2d) 521.....	11
People v. Lucich, 111 Cal. App. 293, 295 Pac. 593.....	25
People v. McKenna, 11 Cal. (2d) 327, 79 Pac. (2d) 1065.....	11
People v. Murray, 42 Cal. App. (2d) 209, 108 Pac. (2d) 748.....	11
People v. Ottøy, 5 Cal. (2d) 714, 56 Pac. (2d) 193.....	12

People v. Owens, 11 Cal. App. (2d) 724, 54 Pac. (2d) 728.....	11
People v. Perry, 14 Cal. (2d) 387, 94 Pac. (2d) 559, 124 A. L. R. 1123	11
People v. Schneider, 36 Cal. App. (2d) 292, 98 Pac. (2d) 215.....	11
People v. Soeder, 150 Cal. 12, 87 Pac. 4016.....	25
People v. Turner, 22 Cal. App. (2d) 186, 70 Pac. (2d) 642.....	11
People v. Wiesel, 39 Cal. App. (2d) 657, 104 Pac. (2d) 70.....	11
People v. Zirbes, 6 Cal. (2d) 425, 57 Pac. (2d) 1319.....	11
Snyder v. Commonwealth of Massachusetts, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674.....	26
State v. Benson, 230 Iowa 1168, 300 N. W. 275.....	14
State v. Ferguson, 226 Iowa 361, 283 N. W. 917.....	13, 14
Tot v. United States, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519.....	19
Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97	15, 17, 18
Worcester County Trust Co. v. Riley, 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268.....	26

STATUTES

California Constitution, Art. I, Sec. 13.....	7, 8, 9, 10, 12
California Constitution, Art. VI, Sec. 19.....	12
California Penal Code, Sec. 1323	7, 9
Constitution of the United States (Anno.), U. S. Govt. Printing Office, 1938 Ed., p. 939.....	15
Constitution of the United States (Anno.), U. S. Govt. Printing Office, 1938 Ed., pp. 946, 947, 949.....	26
Federal Firearms Act, Sec. 2(f).....	19
Judicial Code, Sec. 237 (28 U. S. C. A., Sec. 344a).....	1
United States Constitution, Fourth Amendment.....	19
United States Constitution, Fifth Amendment.....	17, 19
United States Constitution, Fourteenth Amendment.....	7, 8, 17, 19

TEXTBOOKS.	PAGE
12 American Jurisprudence, p. 122.....	15
8 California Jurisprudence, p. 77.....	25
22 Cornell Law Quarterly, pp. 392, 396.....	10, 15, 21
16 Corpus Juris Secundum, p. 1182.....	15
16 Corpus Juris Secundum, p. 1186.....	26
23 Corpus Juris Secundum, Sec. 1098, p. 558.....	23
13 Journal on Criminal Law, p. 292.....	15
31 Michigan Law Review, pp. 40, 226, 228.....	15
9 Proceedings American Law Institute, pp. 202-218.....	9
9 Proceedings American Law Institute, p. 215.....	9
56 Reports American Bar Association, pp. 137-152.....	9
2 Selected Essays on Constitutional Law, pp. 1427-29.....	15
25 Virginia Law Review, p. 90.....	15
4 Wigmore on Evidence, p. 836.....	15
8 Wigmore on Evidence (3d Ed.), p. 414.....	15
26 Yale Law Journal, p. 464.....	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 102.

ADMIRAL DEWEY ADAMSON,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPELLEE'S BRIEF.

Opinion Below:

The opinion of the Supreme Court of California [R. 381] is reported in 27 Cal. (2d) 478, 165 Pac. (2d) 3.

Jurisdiction.

The opinion of the California Supreme Court was filed and its judgment entered [R. 409] January 4, 1946. Petition for Rehearing was filed January 18, 1946 [R. 394], and denied January 31, 1946 [R. 408]. Petition for an Appeal to the United States Supreme Court was filed in the California Supreme Court, April 3, 1946, and denied April 8, 1946. [R. 410.] An order allowing such appeal was made by Associate Justice Wm. O. Douglas, April 15, 1946 [R. 413], and probable jurisdiction was noted June 10, 1946. [R. 418.] Jurisdiction was sought under 28 U. S. C. A. 344a, Judicial Code, Section 237.

Statement.

The body of Stella Blauvelt, a widow 64 years of age, was found on the floor of her Los Angeles apartment on July 25, 1944. The evidence indicated that she died on the afternoon of the preceding day. The body was found with the face upward covered with two bloodstained pillows. A lamp cord was wrapped tightly around the neck three times and tied in a knot. The medical testimony was that death was caused by strangulation. Bruises on the face and hands indicated that the deceased had been severely beaten before her death. [R. 381.]

Six fingerprints, each identified by expert testimony as that of the appellant, were found spread over the surface of the inner door to the garbage compartment of the kitchen of the deceased's apartment. After the murder this door was found unhinged leaning against the kitchen sink. It was established that appellant could have entered through the garbage compartment by having a man about his size do so.

The tops of three women's stockings were found on and in appellant's dresser in his room among other articles of apparel. The stocking parts were not all of the same color. At the end of each part away from what was formerly the top of the stocking a knot or knots were tied. When the body of the deceased was found it did not have on any shoes or stockings. It appeared that on the day of the murder deceased had been wearing stockings. The lower part of a silk stocking with the top torn off was found lying on the floor under the body. No part of the other stocking was found. None of the stocking tops from appellant's room matched with the bottom part of the stocking found under the body. [R. 382.]

The deceased was in the habit of wearing large diamond rings and was wearing same on the day of the murder. These rings were not on the body and search has failed to uncover them. A witness positively identified the defendant and stated that at some time between the 10th and 14th of August, 1944, she overheard defendant ask an unidentified person whether he was interested in buying a diamond ring. [R. 383.] The appellant did not take the witness stand and rested his case without putting in any evidence. [R. 329.]

In oral argument to the jury the prosecutor commented approximately seven times on the appellant's silence. [R. 393.] With but a couple of exceptions these are simple comments upon the fact of defendant's failure to deny or explain evidence which would have been within his power to do. In discussing the testimony of a witness who had identified appellant as having offered a diamond ring for sale, the prosecutor said [R. 343-4]:

"The defendant has not taken the stand; he has not denied that; it is uncontradicted in the testimony. There he sits, not getting on the stand, not giving you what his version of the situation is. You have got the right, members of this jury, to consider the fact and consider that four hundred and some odd pages of testimony are uncontradicted from the lips of this defendant. Why, For example, during the time that Frances Turner was on the stand—it happened here in the courtroom—the defendant and his counsel went into a huddle, and then came up with some questions about a juke box. You remember that. He was there. That conversation happened. He has not denied it; it is uncontradicted."

In discussing the portions of women's stockings found in appellant's room the prosecutor said [R. 347]:

"At least, we have those in the possession of this defendant. No explanation; nothing said or testified by him as to what they are doing in his room. The record is silent."

Again, in discussing the testimony relative to the absence of one stocking and the portion of another stocking found under the deceased's body, the prosecutor said [R. 350-1]:

"Now, the defendant has not explained that. He has not told you why. I would have liked to find out, if he had gotten on the stand, and I think you would have liked to have known why."

Regarding the testimony that the appellant told police officers when arrested that he would have alibi witnesses when the time comes, the prosecutor told the jury [R. 367-8]:

"Have you heard from the lips of the defendant or a single witness called by the defendant where he was other than in that apartment? If he had alibi witnesses that would testify, they would be up here testifying."

Counsel asked this question: 'The defendant may or may not take the stand—you remember that—In the event he does not take the stand, will you view that in the light of the presumption of innocence?' You were asked this question by myself: If the court instructs you that you can consider the fact of the failure of the defendant to take the stand, his failure to explain or deny anything, if you would do that, and you said you would. Now, the defendant does not have to take the stand in any case. He didn't

take it here. He did not call, however, any witnesses. He tells the officers, 'I will have my alibi witnesses.' Where are they? Where are they? You know what stopped him. Those fingerprints; those fingerprints. Not one single witness did they call to the stand. You heard yesterday, 'The People rest,' and the defendant said, 'The defense rests.' I say, why didn't they have them? The reason is, fingerprints; powerful evidence. So far as this defendant is concerned, as I said before, he does not have to take the stand. But it would take about twenty or fifty horses to keep someone off the stand if he was not afraid. He does not tell you. No."

In discussing the presumption of innocence and the doctrine of reasonable doubt the prosecutor after reviewing the same said [R. 369-70]:

"And here we started out in this case with the defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand or did not put any witnesses on the stand, he stood here with that presumption removed, based on the evidence in this case."

Further discussing the evidence of fingerprints and the possibility of crawling through the garbage compartment, the prosecutor stated [R. 372]:

"Then counsel says, if the defendant wasn't there, what has he got to tell you? He says, 'if he wasn't there, what has he got to tell you?' Well, there are a lot of things he could tell us. If he wasn't there,

where was he? Where was he? Was he by himself or was he with somebody? Where are these alibi witnesses he talked about? He could explain how his prints got on there, and he could explain what he was trying to do when he was selling or attempting to sell a diamond ring. He could have done that. Neither he nor witnesses did it."

Then at the close of his argument the prosecutor stated [R. 379]:

"In conclusion, I am going to just make this one statement to you: Counsel asks you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty'? Not one word from him, and not one word from a single witness."

The jury was instructed on the right of court and counsel to comment as follows [R. 9]:

"You are the sole and exclusive judges of the weight of evidence and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case. It is the right of court and counsel to comment on the failure of defendant to explain or deny any evidence against him, and to comment on the evidence, the testimony and credibility of any witness; yet the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses."

The jury returned verdicts finding appellant guilty of murder of the first degree and without any recommendation, thus inflicting the death penalty, and of burglary of the first degree. [R. 30.] A motion for new trial was made and denied. [R. 31-2.]

Summary of Argument.

I.

Article I, Section 13 of the California Constitution, and the similar provision in California Penal Code, Section 1323, permitting comment by the court or counsel on a defendant's failure to explain or deny any evidence or facts in a criminal case against him, do not violate due process of law and are not in conflict with the Fourteenth Amendment to the Constitution of the United States.

II.

Statements by the prosecutor in his argument to the jury, assuming for the sake of argument only that the same are unwarranted, constitute at most procedural errors which were waived by failure to object and do not violate due process of law nor conflict with the Fourteenth Amendment to the United States Constitution and do not constitute a federal question.

III.

The admission of evidence relative to the portions of stockings, assuming for the sake of argument only that the same were inadmissible, constitute at most procedural errors and do not violate due process or conflict with the Fourteenth Amendment to the Constitution of the United States, and do not present a federal question.

ARGUMENT.

Introduction.

This appeal involves primarily two questions: (1) does Article I, Section 13 of the California Constitution and the similar provision of California Penal Code, Section 1323, allowing comment by the court and counsel on a defendant's failure to explain or deny evidence or facts in a criminal case violate the Fourteenth Amendment to the Constitution of the United States, and (2) does the introduction in evidence of portions of women's stockings not belonging to the deceased deny due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

Appellant's attack upon the California constitutional and statutory provisions is that they inherently violate the due process and the privileges and immunities clauses of the Fourteenth Amendment (Appellant's Specifications I and III), that as applied in this case they violate such clauses by shifting the burden of proof from the state to the defendant and infringe upon the presumption of innocence (Appellant's Specifications II and IV), and that there is no reasonable or logical connection between the failure to testify and the presumption or inference therefrom that the defendant is thereby guilty. (Appellant's Specifications V and VI.)

Inasmuch as the basic ground upon which each of these contentions rest is fundamentally the same, we believe it will make for better understanding and eliminate repetition to treat the subject as a whole without any attempt at segregation.

I.

The Right Given by a State to Court and Counsel to Comment Upon Defendant's Failure to Explain or Deny Any Evidence or Facts Against Him Does Not Violate the Fourteenth Amendment to the Constitution of the United States.

Article I, Section 13, of the California Constitution provides, among other things, that:

“but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.”

The foregoing was added to this section of the Constitution by an amendment in 1934. Following this the State Legislature in 1935 added to Section 1323 of the Penal Code the following:

“The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.”

These amendments were enacted following studies made by the American Law Institute and the American Bar Association (9 Proceedings American Law Institute 202-218; 56 Reports A. B. A. 137-152) and considerable discussion and study by the local bar of California. These and similar enactments in other states were brought about in response to a widespread demand on the part of the bench and bar for definite recognition of the right to comment upon the failure of the defendant to testify in a criminal case. The premise upon which this demand rests is well

stated in a remark attributed to former Chief Justice Hughes (9 Proceedings American Law Institute 215):
"It is clear that reversals because a prosecuting attorney had directed the attention of the jury to a circumstance which no intelligent person can help taking into consideration of his own accord, should have no place in any well ordered system of criminal procedure."¹

It is true that by the Federal Constitution and by most, if not all, of the State Constitutions it is guaranteed that no person in a criminal trial shall be compelled to testify against himself. Section 13, of Article I, of the California Constitution, which includes the provision for comment on failure to testify here in question, also contains the provision that:

"No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law;"

The opinion of the California Supreme Court in the instant case leaves little to be added to the discussion of the question here involved. Prior to this decision the ap-

¹The commentator in 22 Cornell Law Quarterly 392, 396, stated the reason as follows: "But perhaps the strongest argument in favor of permitting comment is that it is merely giving judicial sanction to realities. In the absence of comment, and even in the face of instructions to the jury, it is generally recognized that the jury considers the defendant's failure to testify. To say that comment will not affect the jury's verdict, however, is not to admit that the change is unnecessary. To recognize the right will prevent reversals in the appellate court, on what is now regarded as a mere technicality. The right to comment will mean the removal of one of the badges of our sporting theory of justice, and thus, perhaps, help to bring about a greater respect for an approval of our criminal procedure."

pellate courts of California had frequently upheld the validity of both the constitutional provision and the corresponding section of the Penal Code.²

²*People v. Owens*, 11 Cal. App. (2d) 724, 54 Pac. (2d) 728;

People v. Dukes, 16 Cal. App. (2d) 105, 109-10, 60 Pac. (2d) 197;

People v. Turner, 22 Cal. App. (2d) 186, 70 Pac. (2d) 642;

People v. Dozier, 35 Cal. App. (2d) 49, 59-60, 94 Pac. (2d) 598;

People v. Schneider, 36 Cal. App. (2d) 292, 297, 98 Pac. (2d) 215;

People v. Wiczel, 39 Cal. App. (2d) 657, 104 Pac. (2d) 70;

People v. Murray, 42 Cal. App. (2d) 209, 108 Pac. (2d) 748;

People v. Cowan, 44 Cal. App. (2d) 155, 112 Pac. (2d) 62;

People v. Harsch, 44 Cal. App. (2d) 572, 576, 112 Pac. (2d) 654;

People v. Amaya, 44 Cal. App. (2d) 656, 659, 112 Pac. (2d) 942;

People v. Byers, 5 Cal. (2d) 676, 55 Pac. (2d) 1177;

People v. Zirbes, 6 Cal. (2d) 425, 428-9, 57 Pac. (2d) 1319;

People v. McKenna, 11 Cal. (2d) 327, 336, 79 Pac. (2d) 1065;

People v. Boggs, 12 Cal. (2d) 27, 35, 82 Pac. (2d) 368;

People v. Beckhard, 14 Cal. (2d) 690, 96 Pac. (2d) 794.

In *People v. King*, 40 Cal. App. (2d) 137, 142, 104 Pac. (2d) 521, the following comment by prosecuting counsel was held proper under these provisions:

"I make no recommendation, frankly, as to Mr. Jarvis, but I submit to you that King is guilty beyond a reasonable doubt in his whole conduct here and in the exercise of his constitutional right not to testify. Take that for what it is worth."

In *People v. Perry*, 14 Cal. (2d) 387, 395, 94 Pac. (2d) 559, 124 A. L. R. 1123, the court stated that the prosecuting attorney "made some remarks which at first consideration might seem objectionable" but added that "with reference to the comments made by the Deputy District Attorney regarding the failure of defendant to take the witness stand in his own behalf or to deny any of the incriminating evidence against him, it may be noted that by constitutional amendment adopted in 1934," such comment is proper.

Augmenting the amendment to Section 13, of Article I of the California Constitution, the voters of that state at the same time amended Section 19 of Article VI, changing that provision from its original context which read:

"Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

to read:

"The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

The validity of this amendment was upheld in *People v. Ottey*, 5 Cal. (2d) 714, 56 Pac. (2d) 193.³

³In an interesting comment in *People v. Ottey*, 5 Cal. (2d) 714, 722, it is said:

"This court has had occasion heretofore to consider generally the scope of the power reposed in the courts of this state by the change in the Constitution. (*People v. De Moss*, 4 Cal. (2d) 469 (50 Pac. (2d) 1031).) In view of the extensive research by counsel on the question, as evidenced by their briefs, some further elaboration seems desirable. In the first place it is certain that a very distinct and important innovation in the long-standing rule in this state was brought about by the constitutional amendment. Its purpose was to abolish the prior limitations on the trial judge's participation in the trial of a case with respect to comment on the evidence and on the credibility of the witnesses. In other words, it was the intention to place in the trial judge's hands more power in the trial of jury cases and make him a real factor in the administration of justice in such cases, instead of being in the position of a mere referee or automaton as to the ascertainment of the

A rather extended discussion of this question is found in the opinion of the Supreme Court of Iowa in *State v. Ferguson*, 226 Iowa 361, 283 N. W. 917, 918-23, where the defendant failed to take the witness stand and the prosecuting counsel commented upon that fact to the jury. This was attacked as being a violation of the due process clause of the Iowa Constitution. Originally the Iowa law

facts. To the seasoned practitioner in our state courts this so-called radical change has no doubt come with considerable of a shock. None the less the change has been made and it must be recognized as an endeavor to remedy an evil in the trial, especially of criminal cases, by jury. It is the duty of this court to accord to the amendment its full beneficial effect, uninfluenced by decisions in this state under the old law.

"It is apparent from the history of the constitutional amendment that its purpose was to establish the rule in this state in substantial harmony with the practice in other jurisdictions where like powers have been exercised by the trial courts. In the argument submitted to the electors at the general election in 1934, in support of the proposed amendment, it was stated: 'This measure also enables the trial judge to comment to the jury on the facts of the case; to give the jurors his analysis of the evidence and to express his opinion on the merits of the case, but informing them at the same time, that his views are advisory only, and that the jury is the final and sole judge of the facts and of the guilt or innocence of the accused. This is the practice in the courts of Great Britain and Canada, and also in our United States courts.' While the argument sent to the voters is not controlling (*Fay v. District Court of Appeal*, 200 Cal. 522, 537, (254 Pac. 896)), it may be resorted to as an aid in determining the intention of the framers and the electorate when such aid is necessary. Here we need not invoke such argument as an aid to interpretation, for the language of the amendment, though brief, is plain and unambiguous; but it may with propriety be noticed to indicate that it was the general understanding that the proposed innovation in the practice in this state was intended to conform to the practice in other jurisdictions where similar powers were vested in the trial courts, viz., Great Britain, Canada, and the United States courts. By a reference to the courts in those jurisdictions we are not foreclosed from resorting to decisions in sister states which have adopted the same or similar rules."

provided that should a defendant not elect to testify, that fact should not be used against him and prohibited any comment upon the absence of his testimony. Later the section of the law was separated and it was provided in one section that defendants in criminal cases shall be competent witnesses in their own behalf but cannot be called as witnesses by the state, and in another section it was provided that should the defendant not elect to become a witness that fact should not be used against him nor be the subject of comment. This latter section was subsequently repealed. The question then arose in that case as to whether such comment violated the due process clause where the law had specifically prohibited such comment and then such prohibition had been repealed without any legislative provision expressly authorizing comment. The Iowa court held that such comment was not violative of due process.⁴

⁴*State v. Ferguson*, 283 N. W. 917, 922:

"Due process of law requires that the accused be properly charged by an indictment or information and be given adequate information in regard to the nature of the charge against him, that he be accorded representation by counsel, a jury trial in open court, and that the state introduce such competent evidence which, if believed, would be sufficient to establish a defendant's guilt beyond a reasonable doubt, without compelling the defendant, against his will, to testify against himself. When this has been accomplished, the defendant must be accorded full opportunity to introduce his evidence to meet that introduced by the state. Defendant may choose to introduce no evidence. He may choose to offer only witnesses other than himself. He may choose to testify in his own behalf. The choice, in each event, is that of the defendant. Having made his choice, if he chooses not to testify in his own behalf, the effect of such choice, as an inference or presumption of guilt, does not come within the contemplation of what constitutes due process of law."

To the same effect, see *State v. Benson*, 230 Iowa 1168, 300 N. W. 275.

The case of *Twining v. New Jersey*, 211 U. S. 78, 90-91, 29 S. Ct. 14, 16, 53 L. Ed. 97, would seem to be, and generally is considered by courts and text writers, as determinative of this question.⁵

In the *Twining* case the jury were instructed that they might draw an unfavorable inference against the defendants from their failure to testify where it was within their power in denial of the evidence which tended to incriminate them. The law of New Jersey, where the case arose, was deemed to permit such an inference to be drawn.

The Supreme Court said (211 U. S. 90, 29 S. Ct. 14):

The general question, therefore, is whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law. In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: First, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution

⁵31 Mich. L. Rev. 40, 226, 228;

22 Cornell L. Quarterly 392, 396;

25 Va. L. Rev. 90;

2 Selected Essays on Constitutional Law 1427-29;

16 C. J. S. 1182;

12 Am. Jur. 122;

4 Wigmore on Evidence 836;

8 Wigmore on Evidence, 3rd Ed., 414.

Constitution of U. S. (Anno.), U. S. Gov. Printing Office, 1938 Ed., p. 939.

For a discussion on the experience under a similar constitutional provision in Ohio, see 13 J. Crim. L. 292; 26 Yale L. J. 464.

against impairment by the States; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar. The first proposition naturally presents itself for earlier consideration. If the right here asserted is not a Federal right, that is the end of the case. We have no authority to go further and determine whether the state court has erred in the interpretation and enforcement of its own laws."

After an extended discussion on this point this court concluded (211 U. S. 99, 29 S. Ct. 19):

"We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the States."

Continuing, the court said:

"The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law."

In a further extended consideration of this proposition, the court in the course of its opinion said (211 U. S. 107, 29 S. Ct. 23):

"The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or National, for they are secured otherwise, but the rights fundamen-

tal in due process, and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. . . . (211 U. S. 112, 29 S. Ct. 25.) It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend; . . . (211 U. S. 113-114, 29 S. Ct. 26.) There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened, by forced construction of the Federal Constitution."

So far as the Fifth Amendment is concerned the ruling in the *Twining* case has been more recently approved in *Feldman v. United States*, 322 U. S. 487, 490, 64 S. Ct. 1082, 1083, 88 L. Ed. 1046.

In discussing the restrictions placed upon the State by the Fourteenth Amendment, this court in *Palko v. State of Connecticut*, 302 U. S. 218, 325, 58 S. Ct. 149, 152,

82 L. Ed. 288, gave further approval to the doctrines expressed in the *Twining* case, *supra*, and said:

"The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discreet instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' (Citing cases.) Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey, supra*. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. (Citing case.) Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the States has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."

We respectfully submit that most of the authorities cited by appellant have little, if any, application to the question here involved. *Boyd v. United States*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 547; *Brofen v. Walker*, 161 U. S. 591, and *Hale v. Henkel*, 201 U. S. 43, contain strong and vigorous language in support of the guarantee against compulsion to testify against one's self. However, none of these cases have any bearing upon the Fourteenth Amendment but were concerned only with the Fourth and Fifth Amendments. *Johnson v. United States*, 318 U. S. 189, 63 S. Ct. 549, 87 L. Ed. 704, likewise had to do with the Fifth Amendment and an exercise of the claim of privilege against self-incrimination.

The case of *Tot v. United States*, 319 U. S. 463, 496, 467, 63 S. Ct. 1241, 1244, 1245, 87 L. Ed. 1519, involved a Federal prosecution for violation of the Federal Firearms Act. The point for decision was the "question of the power of Congress to create the presumption which section 2(f) declares, namely, that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute."

The court said that, "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

Appellant argues that the California law requires an inference of guilt to be drawn from failure of the defendant to testify and then, from that premise, urges that there is no rational or logical connection between the two.

The Supreme Court of California, however, in the instant case has specifically held that [R. 388]:

"It was never intended, of course, that the 1934 constitutional amendment should relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by admissible evidence supporting each element of the crime. Nor can the defendant's silence be regarded as a confession."

On the contrary, that court specifically held that the effect of the California law is that [R. 387-8]:

"Whenever therefore a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists. Therefore the failure of the defendant to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable."

"The failure of the accused to testify becomes significant because of the presence of evidence that

he might explain or deny by his testimony" (Art. I, sec. 13, Cal. Const.), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge of the facts with respect to which evidence has been admitted against him, for it is not within his "power" to explain or deny such evidence."

We submit that there is no "lack of connection between the two in common experience" as stated in the *Tol* case, *supra*, but on the contrary, it is, as stated in the remark attributed to former Chief Justice Hughes, *supra*, "a circumstance which no intelligent person can help taking into consideration of his own accord," and as said by the commentator in 22 Cornell Law Quarterly 392, 396, permitting such comment "is merely giving judicial sanction to realities. In the absence of comment, and even in the face of instructions to the jury, it is generally recognized that the jury considers the defendant's failure to testify."

In his Specification of Error II appellant bases his attack upon the claim that the violation consists in shifting the burden of proof from the state to the defendant. Of course, the California law makes no such shift. As we have just seen, the California Supreme Court in its opinion in this case stated that this amendment was never intended to "relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by admissible evidence supporting each element of the crime."

Moreover, the case of *McFarland v. American Sugar Co.*, 241 U. S. 79, 86, 36 S. Ct. 498, 501, 60 L. Ed. 904, while holding it to be a violation of the Fourteenth Amendment to create a rebuttable presumption that any person systematically paying in Louisiana a less price for sugar than he pays in any other state is a party to a monopoly or conspiracy in restraint of trade, said:

"As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

Likewise, in the case of *Morrison v. People of the State of California*, 291 U. S. 82, 88, 54 S. Ct. 281, 284, 78 L. Ed. 672, while it held that statutes placing the burden of proving citizenship or eligibility thereto upon defendants when charged with conspiracy to violate the Alien Land Law of California was invalid as denying due process of law, nevertheless, the court placed no such prohibition upon all shifting of burden of proof from the state to defendant, and said that:

"The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance

these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

While the burden is not shifted under the California law, we submit that if it were it would come within the limits delineated and that with the proof the state had offered as to fingerprints and other circumstances pointing to appellant as the perpetrator of the crime, it was just that he be required to repel such proof and circumstances, or in the absence of any denial or explanation to suffer the inference of the probable truth thereof.

In none of the authorities mentioned by appellant has it been intimated that a state may not permit comment upon failure of the accused to testify or to explain or deny some fact in evidence presumably within his knowledge. It has been stated as a general rule in 23 C. J. S. 558, Sec. 1098, that:

“Where a statute permits an indicted person to become a witness in his own behalf, and does not provide that his failure to offer himself shall not raise any presumption, against him, or does not forbid an allusion to such failure by counsel, accused's failure to offer himself as a witness in regard to matters which may be disproved by him may be commented on by the prosecuting attorney.

II.

The Admission in Evidence of Portions of Women's Stockings Found in Appellant's Room and Not Belonging to Deceased Did Not Deny Appellant Due Process of Law.

Appellant urges that the admission of such evidence served no other purpose than to influence or inflame the passions and prejudices of the jury and to imply to appellant, a negro, a sex fetish and a low moral character. It will be noted that the only place in which any such implication is made is to be found in appellant's own language.

The prosecuting attorney made only one reference to this evidence. [R. 346-7.] In that comment the prosecuting attorney made a very fair statement in which there was nothing derogatory to appellant in any way other than the unexplained implication of the identity between the stocking tops found in appellant's room and the fact that one stocking of the deceased victim was wholly missing and the other ~~stocking~~ had the top torn off and removed.

The California Supreme Court in its opinion [R. 384-5] held that this evidence was relevant as showing in appellant an interest in women's stocking tops which was a circumstance ~~tending~~ to identify him as the person who removed the stockings from the victim and ~~took away the top of one and the whole of the other.~~ The court was careful to say that while this was not by itself sufficient to identify appellant as the criminal it did constitute a logical link in the chain of evidence, the weight of which was a matter for determination by the jury.

"Evidence which is relevant is not rendered incompetent because it is prejudicial to the defendant

or reflects discreditably upon him, or because it may awaken feelings of horror or indignation in the minds of the jury."—(8 Cal. Jur. 77; *People v. Soeder*, 150 Cal. 12, 15, 87 Pac. 1016; *People v. Lucich*, 111 Cal. App. 293, 296, 295 Pac. 593.)

In *Lisenba v. People of the State of California*, 314 U. S. 219, 228, 62 S. Ct. 280, 286, 86 L. Ed. 166, cited by appellant, the same contention was raised relative to the production in court and offer in evidence of two rattlesnakes for the purpose of identifying the same as having been purchased by the defendant for the purpose of poisoning his wife. This court said:

"We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process."

There is, of course, as asserted by appellant, no question but that "this court has repeatedly held that incompetent evidence used to inflame the passions and prejudices of the jury offends due process of law." Here, however, the highest court of the state has held that such evidence was competent, not "incompetent," and there is not the slightest basis to show that it was introduced for the purpose of, or did in fact, inflame the passions and prejudices of the jury.

Such cases as *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, and following ones cited by appellant, have, we submit, no application to the point here in question. In the *Chambers* case this court concluded that negro defendants in the southern states had been bulldozed and mistreated until in sheer desperation a confession was obtained from them, and as the court said, "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."

The Constitution does not guarantee that the decisions of State courts shall be free of error. Also, the guarantee of due process is not a guarantee that every ruling of the court during the trial shall be correct, at least where there is an appropriate remedy for the correction of errors; and where the trial is conducted in accordance with the general principles of the prescribed procedure, mere errors of the trial court in the application of these principles may not constitute a denial of due process.

As was said by this court in speaking of an action in the Massachusetts courts in *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674:

"The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness; unless in so doing it offends some principle of justice so

Worcester County Trust Co. v. Riley, 302 U. S. 292, 299, 58 S. Ct. 185, 188, 82 L. Ed. 268.

16 C. J. S. 1186.

Constitution of the United States, Annotated Edition by U. S. Government Printing Office 1938, pp. 946, 947, 949.

rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing cases.) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. (Citing cases.) Indictments by a grand jury may give way to informations by a public officer. (Citing cases.) "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. *Twining v. New Jersey, supra*. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."

Conclusion.

We have attempted to set forth such additional matters as we thought might be helpful to the already fairly thorough discussion of this subject contained in the opinion of the California Supreme Court. That the provisions of the California Constitution and of the Penal Code, permitting comment by court and counsel on the failure of a defendant to explain or deny any evidence or facts in the case against him, whether he testified or not, are valid and do no violence to the Fourteenth Amendment, finds, we believe, abundant support, both in reason and in the authorities cited.

A careful examination of the record in this case will, we submit, afford conviction that appellant had a full and fair trial, and that if there were procedural errors they were not prejudicial and not of a character nor importance to warrant this court in taking cognizance of

them. Certainly there is nothing in the record that can be said to "shock the conscience," or that is "abhorrent to the sense of justice," or that offends any principle of justice so noted in the conscience as to be ranked as fundamental. The comments of the prosecuting attorney now complained of were not even so harsh or uncalled for as to bring forth at the time a single protest or objection on the part of appellant or his counsel.

Respectfully submitted,

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Assistant Attorney General;

Attorneys for Appellee.

J. Black & 1.4

SUPREME COURT OF THE UNITED STATES

No. 102.—OCTOBER TERM, 1946.

Admiral Dewey Adamson, Appellant,	} Appeal from the Supreme Court of the State of California.
<i>v.</i> People of the State of California.	

[June 23, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

The appellant, Adamson, a citizen of the United States, was convicted, without recommendation for mercy, by a jury in a Superior Court of the State of California of murder in the first degree.¹ After considering the same objections to the conviction that are pressed here, the sentence of death was affirmed by the Supreme Court of the state. 27 Cal. (2) 478. Review of that judgment by this Court was sought and allowed under Judicial Code § 237; 28 U. S. C. § 344.² The provisions of California law which were challenged in the state proceedings as invalid under the Fourteenth Amendment to the Federal Constitution are those of the state constitution and penal code in the margin. They permit the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury.³ The defendant did not testify.

¹ There was also a conviction for first degree burglary. This requires no discussion.

² This section authorizes appeal to this Court from the final judgment of a state when the validity of a state statute is questioned on the ground of its being repugnant to the Constitution of the United States. The section has been applied so as to cover a state constitutional provision. *Railway Express Agency, Inc. v. Virginia*, 282 U. S. 440; *King Mfg. Co. v. Augusta*, 277 U. S. 100.

³ Constitution of California, Art. 1, § 13:

"No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself;

As the trial court gave its instructions and the District Attorney argued the case in accordance with the constitutional and statutory provisions just referred to, we have for decision the question of their constitutionality in these circumstances under the limitations of § 1 of the Fourteenth Amendment.⁴

The appellant was charged in the information with former convictions for burglary, larceny and robbery and pursuant to § 1025, California Penal Code, answered that he had suffered the previous convictions. This answer barred allusion to these charges of convictions on the trial.⁵ Under California's interpretation of § 1025 of the Penal Code and § 2051 of the Code of Civil Procedure, however, if the defendant, after answering affirmatively charges alleging prior convictions, takes the witness stand to deny or explain away other evidence that has been introduced

nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ."

Penal Code of California, § 1323: "A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

⁵ Penal Code of California, § 1025: "... In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial."

"the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony." *People v. Adamson*, 27 Cal. (2) 478, 494; *People v. Braut*, 14 Cal. (2) 1, 6. This forces an accused who is a repeated offender to choose between the risk of having his prior offenses disclosed to the jury or of having it draw harmful inferences from uncontradicted evidence that can only be denied or explained by the defendant.

In the first place, appellant urges that the provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is a fundamental national privilege or immunity protected against state abridgment by the Fourteenth Amendment or a privilege or immunity secured, through the Fourteenth Amendment, against deprivation by state action because it is a personal right, enumerated in the federal Bill of Rights.

Secondly, appellant relies upon the due process of law clause of the Fourteenth Amendment to invalidate the provisions of the California law, set out in note 3 *supra*, and as applied (a) because comment on failure to testify is permitted; (b) because appellant was forced to forego testimony in person because of danger of disclosure of his past convictions through cross-examination and (c) because the presumption of innocence was infringed by the shifting of the burden of proof to appellant in permitting comment on his failure to testify.

We shall assume, but without any intention thereby of ruling upon the issue,⁶ that state permission by law to the

⁶ The California law protects a defendant against compulsion to testify, though allowing comment upon his failure to meet evidence against him. The Fifth Amendment forbids compulsion on a defendant to testify. *Boyd v. United States*, 116 U. S. 616, 631, 632; cf. *Davis v. United States*, 328 U. S. 582, 587, 593. A federal statute that grew out of the extension of permissible witnesses to include those charged with offenses negatives a presumption against an accused

court, counsel and jury to comment upon and consider the failure of defendant "to explain or to deny by his testimony any evidence or facts in the case against him" would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. *Barron v. Baltimore*, 7 Pet. 243; *Feldman v. United States*, 322 U. S. 487, 490. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence, secured for citizens federal protection for their elemental privileges and immunities of state citizenship. *The Slaughter-House*

for failure to avail himself of the right to testify in his own defense. 28 U. S. C. § 632; *Brund v. United States*, 308 U. S. 287. It was this statute which is interpreted to protect the defendant against comment for his claim of privilege. *Wilson v. United States*, 149 U. S. 60, 66; *Johnson v. United States*, 318 U. S. 189, 199.

⁷ "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Cases* decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. *Maxwell v. Bugbee*, 250 U. S. 525, 537; *Hamilton v. Regents*, 293 U. S. 245, 261. The power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in *Twining v. New Jersey*, 211 U. S. 78, 91-98. "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." "The *Twining* case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the

* 16 Wall. 36. The brief of Mr. Fellows for the plaintiff in error set out the legislative history in an effort to show that the purpose of the first section of the Fourteenth Amendment was to put the "Rights of Citizens" under the protection of the United States. It was pointed out, p. 12, that the Fourteenth Amendment was needed to accomplish that result. After quoting from the debates, the brief summarized the argument, as follows, p. 21:

"As the result of this examination, the only conclusion to be arrived at, as to the intention of Congress in proposing the amendments, and especially the first section of the Fourteenth Amendment, and the interpretation universally put upon it by every member of Congress, whether friend or foe, the interpretation in which all were agreed, was, in the words of Mr. Hale, that it was intended to apply to every State which has failed to apply equal protection to life, liberty and property; or in the words of Mr. Bingham, that the protection given by the laws of the States shall be equal in respect to life, liberty and property to all persons; or in the language of Mr. Sumner, that it abolished oligarchy, aristocracy, caste, or monopoly with peculiar privileges and powers."

* *Snyder v. Massachusetts*, 291 U. S. 97, 105; *Palko v. Connecticut*, 302 U. S. 319, 324; *Twining v. New Jersey*, *supra*, 114.

Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. *Twining v. New Jersey*, *supra*, at 98-99; *Palko v. Connecticut*, *supra*, at 328. After declaring that state and national citizenship co-exist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship.¹⁰ It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power. We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.

Appellant secondly contends that if the privilege against self-incrimination is not a right protected by the privileges and immunities clause of the Fourteenth Amendment

¹⁰ See *Madden v. Kentucky*, 309 U. S. 83, 90, and cases cited; and see the concurring opinions in *Edwards v. California*, 314 U. S. 169, and the opinion of Stone, J., in *Hague v. C. I. O.*, 307 U. S. 496, 519.

against state action, this privilege, to its full scope under the Fifth Amendment, inheres in the right to a fair trial. A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment.¹¹ Therefore, appellant argues, the due process clause of the Fourteenth Amendment protects his privilege against self-incrimination. The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in *Palko v. Connecticut*, 302 U. S. 319, 323. It was rejected with citation of the cases excluding several of the rights protected by the Bill of Rights, against infringement by the National Government. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted it intended its due process clause to draw within its scope the earlier amendments to the Constitution. *Palko* held that such provisions of the Bill of Rights as were "implicit in the concept of ordered liberty," p. 325, became secure from state interference by the clause. But it held nothing more.

Specifically, the due process clause does not protect, by virtue of its mere existence the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. *Twining v. New Jersey*, 211 U. S. 78, 99-114; *Palko v. Connecticut*, *supra*, p. 323. For a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial. Therefore, we must examine the effect of the California law applied in this trial to see whether the comment on failure to testify violates the protection against state action that the due process clause does grant to an

¹¹ *Moore v. Dempsey*, 261 U. S. 86, 91; *Chambers v. Florida*, 309 U. S. 227, 238; *Buchalter v. New York*, 349 U. S. 427.

accused. The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion.¹² It forbids any other type of coercion that falls within the scope of due process.¹³ California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony.¹⁴ Cf. Wigmore (3d ed.) § 2252. That is a matter of legal policy and not because of the requirements of due process under the Fourteenth Amendment.¹⁵ So our inquiry is directed, not at the broad question of the constitutionality of compulsory testimony from the accused under the due process clause, but to the constitutionality of the provision of the California law that permits comment upon his failure to testify. It is, of course, logically possible that while an accused might be required, under appropriate penalties, to submit himself as a witness without a violation of due process, comment by judge or jury on inferences to be drawn from his failure to testify, in jurisdictions where an accused's privilege against self-incrimination is protected, might deny due process. For example, a statute might declare that a permitted refusal to testify would compel an acceptance of the truth of the prosecution's evidence.

Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions.¹⁶ This

¹² *White v. Texas*, 310 U. S. 530; *Brugn v. Mississippi*, 297 U. S. 278; *Ashcraft v. Tennessee*, 322 U. S. 143, 154; *Ashcraft v. Tennessee*, 327 U. S. 274.

¹³ See *Malinski v. New York*, 324 U. S. 401, concurring op. at 414, dissent at 438; *Buchalter v. New York*, *supra*, at 429; *Palko v. Connecticut*, *supra*, at 325; *Carter v. Illinois*, 329 U. S. 173.

State action must "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" *Hebert v. Louisiana*, 272 U. S. 312, 346.

¹⁴ *Twining v. New Jersey*, *supra*, pp. 110-12.

¹⁵ VIII Wigmore, *supra*, 412.

arises from state constitutional or statutory provisions similar in character to the federal provisions. Fifth Amendment and 28 U. S. C. § 632. California, however, is one of a few states that permit limited comment upon a defendant's failure to testify.¹⁶ That permission is narrow. The California law is set out in note 3 and authorizes comment by court and counsel upon the "failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him." This does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact, that is offered in evidence. Compare *Tot v. United States*, 319 U. S. 463, 470. It allows inferences to be drawn from proven facts. Because of this clause, the court can direct the jury's attention to whatever evidence there may be that a defendant could deny and the prosecution can argue as to inferences that may be drawn from the accused's failure to testify. Compare *Caminetti v. United States*, 242 U. S. 470, 492-95; *Raffel v. United States*, 271 U. S. 494, 497. There is here no lack of power in the trial court to adjudge and no denial of a hearing. California has prescribed a method for advising the jury in the search for truth. However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution

¹⁶ The cases and statutory references are collected in VIII, Wigmore, *supra*, at pp. 413 *et seq.* New Jersey, Ohio and Vermont permit comment. The question of permitting comment upon the failure of an accused to testify has been a major for consideration in recent years. See Reports of American Bar Association (1931) 137; Proceedings, American Law Institute, 1930-31, 202; Reeder, *Comment Upon Failure of Accused to Testify*, 31 Mich. L. Rev. 40; Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, *Id.*, 226.

should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain.

Appellant sets out the circumstances of this case, however, to show coercion and unfairness in permitting comment. The guilty person was not seen at the place and time of the crime. There was evidence, however, that entrance to the place or room where the crime was committed might have been obtained through a small door. It was freshly broken. Evidence showed that six fingerprints on the door were petitioner's. Certain diamond rings were missing from the deceased's possession. There was evidence that appellant, sometime after the crime, asked an unidentified person whether the latter would be interested in purchasing a diamond ring. As has been stated, the information charged other crimes to appellant and he admitted them. His argument here is that he could not take the stand to deny the evidence against him because he would be subjected to a cross-examination as to former crimes to impeach his veracity and the evidence so produced might well bring about his conviction. Such cross-examination is allowable in California. *People v. Adamson, supra*, 494. Therefore, appellant contends the California statute permitting comment denies him due process.

It is true that if comment were forbidden, an accused in this situation could remain silent and avoid evidence of former crimes and comment upon his failure to testify. We are of the view, however, that a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose

of due process is not to protect an accused against a proper conviction but against an unfair conviction. When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances.¹⁷

There is no basis in the California law for appellant's objection on due process or other grounds that the statutory authorization to comment on the failure to explain or deny adverse testimony shifts the burden of proof or the duty to go forward with the evidence. Failure of the accused to testify is not an admission of the truth of the adverse evidence. Instructions told the jury that the burden of proof remained upon the state and the presumption of innocence with the accused. Comment on failure to deny proven facts does not in California tend to supply any missing element of proof of guilt. *People v. Adamson, supra*, 489-95. It only directs attention to the strength of the evidence for the prosecution or to the weakness of that for the defense. The Supreme Court of California called attention to the fact that the prosecutor's argument approached the borderline in a statement that might have

¹⁷ Comment here did not follow a grant of privilege that carried immunity from comment. The choice between giving evidence and remaining silent was an open choice. There was no such possible misleading of the defendant as we condemned in *Johnson v. United States*, 318 U. S. 189, 195-99.

been construed as asserting "that the jury should infer guilt solely from defendant's silence." That court felt that it was improbable the jury was misled into such an understanding of their power. We shall not interfere with such a conclusion. *People v. Adamson, supra*, 494-95.

Finally, appellant contends that due process of law was denied him by the introduction as evidence of tops of women's stockings that were found in his room. The claim is made that such evidence inflamed the jury. The lower part of a woman's stocking was found under the victim's body. The top was not found. The corpse was barelegged. The tops from defendant's room did not match the lower part found under the dead body. The California court held that the tops were admissible as evidence because this "interest in women's stocking tops is a circumstance that tends to identify defendant" as the perpetrator of the crime. We do not think the introduction of this evidence violated any federal constitutional right.

We find no other error that gives ground for our intervention in California's administration of criminal justice.

- Affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 102.—OCTOBER TERM, 1946.

Admiral Dewey Adamson, Appellant.	} Appeal from the Supreme Court of the State of California.
People of the State of California.	

[June 23, 1947.]

MR. JUSTICE FRANKFURTER, concurring.

Less than ten years ago, Mr. Justice Cardozo announced as settled constitutional law that while the Fifth Amendment, "which is not directed to the states, but solely to the federal government," provides that no person shall be compelled in any criminal case to be a witness against himself, the process of law assured by the Fourteenth Amendment does not require such immunity from self-
crimination. "in prosecutions by a state, the exemption will fail if the state elects to end it." *Palko v. Connecticut*, 302 U. S. 319, 322, 324. Mr. Justice Cardozo spoke for the Court, consisting of Mr. Chief Justice Hughes, and McReynolds, Brandeis, Sutherland, Stone, Roberts, Black, JJ. (Mr. Justice Butler dissented.) The matter no longer called for discussion; a reference to *Twining v. New Jersey*, 211 U. S. 78, decided thirty years before the *Palko* case, sufficed.

Decisions of this Court do not have equal intrinsic authority. The *Twining* case shows the judicial process at its best—comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court. After enjoying unquestioned prestige for forty years, the *Twining* case should not now be diluted, even unwittingly,

either in its judicial philosophy or in its particulars. As the surest way of keeping the *Twining* case intact, I would affirm this case on its authority.

The circumstances of this case present a minor variant from what was before the Court in *Twining v. United States*, *supra*. The attempt to inflate the difference into constitutional significance was adequately dealt with by Mr. Justice Traynor in the court below. *People v. Adamson*, 27 Cal. 2d 478. The matter lies within a very narrow compass. The point is made that a defendant who has a vulnerable record would, by taking the stand, subject himself to having his credibility impeached thereby. See *Raffel v. United States*, 271 U. S. 494, 496-97. Accordingly, under California law, he is confronted with the dilemma, whether to testify and perchance have his bad record prejudice him in the minds of the jury, or to subject himself to the unfavorable inference which the jury might draw from his silence. And so, it is argued, if he chooses the latter alternative, the jury ought not to be allowed to attribute his silence to a consciousness of guilt when it might be due merely to a desire to escape damaging cross-examination.

This does not create an issue different from that settled in the *Twining* case. Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process." Nor does it make any difference in drawing significance from silence under such circumstances that an accused may deem it more advantageous to remain silent than to speak, on the

nice calculation that by taking the witness stand he may expose himself to having his credibility impugned by reason of his criminal record. Silence under such circumstances is still significant. A person in that situation may express to the jury, through appropriate requests to charge, why he prefers to keep silent. A man who has done one wrong may prove his innocence on a totally different charge. To deny that the jury can be trusted to make such discrimination is to show little confidence in the jury system. The prosecution is frequently compelled to rely on the testimony of shady characters whose credibility is bound to be the chief target of the defense. It is a common practice in criminal trials to draw out of a vulnerable witness' mouth his vulnerability, and then convince the jury that nevertheless he is telling the truth in this particular case. This is also a common experience for defendants.

For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. 20 Stat. 30; see *Bruno v. United States*, 308 U. S. 287. But to suggest that such a limitation can be drawn out of "due process" in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. (This opinion is concerned solely with a discussion of the Due Process Clause of the Fourteenth Amendment. I put to one side the Privileges or Immunities Clause of that Amendment. For the mischievous uses to which that clause would lend itself if its scope were not confined to that given it by all but one of the decisions beginning with the *Slaughter-House Cases*, 16 Wall. 36, see the deviation in *Colgate v. Harvey*, 296 U. S. 404, overruled by *Madden v. Kentucky*, 309 U. S. 83.)

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are “narrow or provincial” would deem essential to “a fair and enlightened system of justice.” *Palko v. Connecticut*, 302 U. S. 319, 325. To suggest that it is inconsistent with a truly free society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de

Tocqueville's phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains "nor shall any State deprive any person of life, liberty, or property, without due process of law," was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it. It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way. After all, an amendment to the Constitution should be read in a "sense most obvious to the common understanding at the time of its adoption" . . . For it was for public adoption that it was proposed." See Mr. Justice Holmes in *Eisner v. Macomber*, 252 U. S. 189, 220. Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments. Some of these are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts. The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth-Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amend-

ment became part of the Constitution. Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing* of

the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than a distorting distance is likely to vouchsafe.

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quirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.

Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of twelve for every case

*The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866." *Davidson v. New Orleans*, 96 U. S.

involving a claim above twenty dollars. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of twelve for every claim above twenty dollars might appear to another as an ultimate need in a free society. In the history of thought "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth. If all that is meant is that due process contains within itself certain minimal standards which are "of the very essence of a scheme of ordered liberty," *Palko v. Connecticut*, 302 U. S. 319, 325, putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed. We are called upon to apply to the difficult issues of our own day the wisdom afforded by the great opinions in this field, such as those in *Davidson v. New Orleans*, 96 U. S. 97, *Missouri v. Lewis*, 101 U. S. 22, *Hurtado v. California*, 110 U. S. 516, *Holden v. Hardy*, 169 U. S. 366, *Twining v. New Jersey*, 211 U. S. 78, and *Palko v. Connecticut*, 302 U. S. 319. This guidance bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and how they are lost. As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is "a

~~constitution we are expounding,"~~ so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. See *Malinski v. New York*, 324 U. S. 401, 412 *et seq.*; *Louisiana v. Resweber*, 329 U. S. 459, 466 *et seq.* The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. The Fifth Amendment specifically prohibits prosecution of an "infamous crime" except upon indictment; it forbids double jeopardy; it bars compelling a person to be a witness against himself in any criminal case; it precludes deprivation of "life, liberty, or property, without due process of law." Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? To consider "due process of law" as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen.

A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for

reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791. Such a view not only disregards the historic meaning of "due process." It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeon-holes of the specific provisions. It seems pretty late in the day to suggest that a phrase so laden with historic meaning should be given an improvised content consisting of some but not all of the provisions of the first eight Amendments, selected on an undefined basis, with improvision of content for the provisions so selected.

improvisation

And so, when, as in a case like the present, a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause

must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.

SUPREME COURT OF THE UNITED STATES

No. 102.—OCTOBER TERM, 1946.

Admiral Dewey Adamson, Appellant.	} Appeal from the Supreme Court of the State of California.
<i>v.</i> — People of the State of California.	

[June 23, 1947.]

MR. JUSTICE BLACK, dissenting.

The appellant was tried for murder in a California state court. He did not take the stand as a witness in his own behalf. The prosecuting attorney, under purported authority of a California statute, Cal. Penal Code, § 1323 (Hillyer-Lake, 1945), argued to the jury that an inference of guilt could be drawn because of appellant's failure to deny evidence offered against him. The appellant's contention in the state court and here has been that the statute denies him a right guaranteed by the Federal Constitution. The argument is that (1) permitting comment upon his failure to testify has the effect of compelling him to testify so as to violate that provision of the Bill of Rights contained in the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself"; and (2) although this provision of the Fifth Amendment originally applied only as a restraint upon federal courts, *Barron v. Baltimore*, 7 Pet. 243, the Fourteenth Amendment was intended to, and did, make the prohibition against compelled testimony applicable to trials in state courts.

The Court refuses to meet and decide the appellant's first contention. But while the Court's opinion, as I read it, strongly implies that the Fifth Amendment does not, of itself, bar comment upon failure to testify in federal courts, the Court nevertheless assumes that it does in order to reach the second constitutional question involved in

appellant's case. I must consider the case on the same assumption that the Court does. For the discussion of the second contention turns out to be a decision which reaches far beyond the relatively narrow issues on which this case might have turned.

This decision reasserts a constitutional theory spelled out in *Twining v. New Jersey*, 211 U. S. 78, that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice."¹ Invoking this *Twining* rule, the Court concludes that although comment upon testimony in a federal court would violate the Fifth Amendment, identical comment in a state court does not violate today's fashion in civilized decency and fundamentals and is therefore not prohibited by the Federal Constitution as amended.

The *Twining* case was the first, as it is the only decision of this Court, which has squarely held that states were free, notwithstanding the Fifth and Fourteenth Amendments, to extort evidence from one accused of crime.² I agree that if *Twining* be reaffirmed, the result reached might appropriately follow. But I would not reaffirm the *Twining* decision. I think that decision and the "natural law" theory of the Constitution upon which it relies, degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court

¹ The cases on which the Court relies seem to adopt these standards. *Malinski v. New York*, 324 U. S. 401, concurring opinion, 412-417; *Buchalter v. New York*, 319 U. S. 427, 429; *Hebert v. Louisiana*, 272 U. S. 312, 316.

² "The question in the case at bar has been twice before us, and been left undecided, as the cases were disposed of on other grounds." *Twining v. New Jersey*, *supra*, 92. In *Palko v. Connecticut*, 302 U. S. 319, relied on by the Court, the issue was double jeopardy and not to enforced self-incrimination.

a broad power which we are not authorized by the Constitution to exercise. Furthermore, the *Twining* decision rested on previous cases and broad hypotheses which have been undercut by intervening decisions of this Court. See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 191, 202. My reasons for believing that the *Twining* decision should not be revitalized can best be understood by reference to the constitutional, judicial, and general history that preceded and followed the case. That reference must be abbreviated far more than is justified but for the necessary limitations of opinion-writing.

The first ten amendments were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments—Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases.³ Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their

³ The Fifth Amendment requires indictment by a Grand Jury in many criminal trials, prohibits double jeopardy, self-incrimination, deprivation of life, liberty or property without due process of law, or the taking of property for public use without just compensation.

The Sixth Amendment guarantees to one accused of crime a speedy, public trial before an impartial jury of the district where the crime was allegedly committed; it requires that the accused be informed of the nature of the charge against him, confronted with the witnesses against him, have compulsory process to obtain witnesses in his favor, and assistance of counsel.

The Eighth Amendment prohibits excessive bail, fines and cruel and unusual punishments.

adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.

But these limitations were not expressly imposed upon state court action. In 1833, *Barron v. Baltimore*, *supra*, was decided by this Court. It specifically held inapplicable to the states that provision of the Fifth Amendment, which declares: "nor shall private property be taken for public use, without just compensation." In deciding the particular point raised, the Court there said, that it could not hold that the first eight amendments applied to the states. This was the controlling constitutional rule when the Fourteenth Amendment was proposed in 1866.⁴

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.⁵ With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the

⁴ See Appendix, *infra*, p. 31.

⁵ Another prime purpose was to make colored people citizens entitled to full equal rights as citizens despite what this Court decided in the *Dred Scott* case. *Scott v. Sandford*, 19 How. 393.

A comprehensive analysis of the historical origins of the Fourteenth Amendment, Flack, *The Adoption of the Fourteenth Amendment* (1908) 94, concludes that "Congress, the House and the Senate, had

constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.

In construing other constitutional provisions, this Court has almost uniformly followed the precept of *Ex parte Bain*, 121 U. S. 1242, that "It is never to be forgotten that, in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." See also *Everson v. Board of Education*, — U. S. —, —, —, —; *Thornhill v. Alabama*, 310 U. S. 88, 95, 162; *Knowlton v. Moore*, 178 U. S. 41, 89, 106; *Reynolds v. United States*, 98 U. S. 145, 162; *Barron v. Baltimore*, *supra* at 250-251; *Cohens v. Virginia*, 6 Wheat. 264, 416-420.

Investigation of the cases relied upon in *Twining v. New Jersey* to support the conclusion there reached that neither the Fifth Amendment's prohibition of compelled testimony, nor any of the Bill of Rights, applies to the States, reveals an unexplained departure from this salutary practice. Neither the briefs nor opinions in any of these cases, except *Maxwell v. Dow*, 176 U. S. 581, make reference to the legislative and contemporary history for the purpose of demonstrating that those who conceived, shaped, and brought about the adoption of the Fourteenth Amendment intended it to nullify this Court's decision in *Barron v. Baltimore*, *supra*, and thereby to make the

the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:

- "1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States
- "2. To give validity to the Civil Rights Bill.
- "3. To declare who were citizens of the United States."

Bill of Rights applicable to the States. In *Maxwell v. Dow*, *supra*, the issue turned on whether the Bill of Rights guarantee of a jury trial was, by the Fourteenth Amendment, extended to trials in state courts. In that case counsel for appellant did cite from the speech of Senator Howard, Appendix, *infra*, p. 38, which so emphatically stated the understanding of the framers of the Amendment—the Committee on Reconstruction for which he spoke—that the Bill of Rights was to be made applicable to the states by the Amendment's first section. The Court's opinion in *Maxwell v. Dow*, *supra*, 601, acknowledged that counsel had "cited from the speech of one of the Senators," but indicated that it was not advised what other speeches were made in the Senate or in the House. The Court considered, moreover, that "What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it." *Id.* at 601-602.

In the *Twining* case itself, the Court was cited to a then recent book, Guthrie, Fourteenth Amendment to the Constitution (1898). A few pages of that work recited some of the legislative background of the Amendment, emphasizing the speech of Senator Howard. But Guthrie did not emphasize the speeches of Congressman Bingham, nor the part he played in the framing and adoption of the first section of the Fourteenth Amendment. Yet Congressman Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment. In the *Twining* opinion the Court explicitly declined to give weight to the historical demonstration that the first section of the Amendment was intended to apply to the states the several protections of the Bill of Rights. It held that that question was "no longer open" because

of previous decisions of this Court which, however, had not appraised the historical evidence on that subject. *Id.* at 98. The Court admitted that its action had resulted in giving "much less effect to the Fourteenth Amendment than some of the public men active in framing it" had intended it to have. *Id.* at 96. With particular reference to the guarantee against compelled testimony, the Court stated that "Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view." *Id.* at 113. Thus the Court declined and again today declines, to appraise the relevant historical evidence of the intended scope of the first section of the Amendment. Instead it relied upon previous cases, none of which had analyzed the evidence showing that one purpose of those who framed, advocated, and adopted the Amendment had been to make the Bill of Rights applicable to the States. None of the cases relied upon by the Court today made such an analysis.

For this reason, I am attaching to this dissent, an appendix which contains a resumé, by no means complete, of the Amendment's history. In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights. Whether this Court ever will, or whether it now should, in the light of past decisions, give full effect to what the Amendment was intended to accomplish is not necessarily essential to a decision here. However that may be, our prior decisions, including *Twining*, do not prevent our carrying out that purpose, at least to the extent of making applicable to the states, not a mere part, as the Court has, but the full protection of

the Fifth Amendment's provision against compelling evidence from an accused to convict him of crime. And I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power. And my belief seems to be in accord with the views expressed by this Court, at least for the first two decades after the Fourteenth Amendment was adopted.

In 1872, four years after the Amendment was adopted, the *Slaughterhouse* cases came to this Court. 16 Wall. 36. The Court was not presented in that case with the evidence which showed that the special sponsors of the Amendment in the House and Senate had expressly explained one of its principal purposes to be to change the Constitution as construed in *Barron v. Baltimore*, *supra*, and make the Bill of Rights applicable to the states.⁹ Nor

⁹ It is noteworthy that before the *Twining* decision Justices Bradley, Field, Swayne, Harlan, and apparently Brewer, although they had not been presented with and did not rely upon a documented history of the Fourteenth Amendment such as is set out in the Appendix, *infra*, nevertheless dissented from the view that the Fourteenth Amendment did not make provisions of the Bill of Rights applicable to the states. ~~At pp. 52-56 of the attached Appendix~~ I have referred to some cases evidencing their views, and set out some expressions of it.

A contemporary comment illustrates that the *Slaughterhouse* interpretation of the Fourteenth Amendment was made without full regard for the congressional purpose or popular understanding.

"It must be admitted that the construction put upon the language of the first section of this amendment by the majority of the court is not its primary and most obvious signification. Ninety-nine out of every hundred educated men, upon reading this section over, would at first say that it forbade a state to make or enforce a law

(at pp 420-123)

was there reason to do so. For the state law under consideration in the *Slaughterhouse* cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was "no direct constitutional provision against a monopoly." The ar-

which abridged any privilege or immunity whatever of one who was a citizen of the United States; and it is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear. It is a little remarkable that, so far as the reports disclose, no one of the distinguished counsel who argued this great case (the *Slaughter-House Cases*), nor any one of the judges who sat in it, appears to have thought it worth while to consult the proceedings of the Congress which proposed this amendment, to ascertain what it was that they were seeking to accomplish. Nothing is more common than this. There is hardly a question raised as to the true meaning of a provision of the old, original Constitution that resort is not had to Elliott's Debates, to ascertain what the framers of the instrument declared at the time that they intended to accomplish. . . . Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 So. L. Rev. (N. S.) 558, 563 (1879).

For a collection of other comments on the *Slaughterhouse* cases, see 2 Warren, *The Supreme Court in United States History* (1937) c. 32.

The case was not decided until over two years after it was submitted. In a short brief filed some two years after the first briefs, one of the counsel attacking the constitutionality of the state statute referred to and cited part of the history of the Fourteenth Amendment. The historical references made were directed only to an effort to show that a purpose of the Fourteenth Amendment was to protect freedom of contract against monopoly since monopolies interfered with the freedom of contract and the right to engage in business. Nonetheless some of these references would have supported the theory, had it been in question there, that a purpose of the Fourteenth Amendment was to make the Bill of Rights applicable to the states. For counsel quoted a statement by Congressman Bingham that " . . . it is . . . clear by every construction of the Constitution, its continued construction, legislative, executive and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States. The House knows, the country knows . . . that the legislative, executive and judicial officers of eleven States within this Union, within the last

gument did not invoke any specific provision of the Bill of Rights, but urged that the state monopoly statute violated "the natural right of a person" to do business and engage in his trade or vocation. On this basis, it was contended that "bulwarks that have been erected around the investments of capital are impregnable against state legislation." These natural law arguments, so suggestive of the premises on which the present due process formula rest, were flatly rejected by a majority of the Court in the *Slaughterhouse* cases. What the Court did hold was that the privileges and immunities clause of the Fourteenth Amendment only protected from state invasion such rights as a person has because he is a citizen of the United States. The Court enumerated some, but refused to enumerate all of these national rights. The majority of the Court emphatically declined the invitation of counsel to hold that the Fourteenth Amendment subjected all state regulatory legislation to continuous censorship by this Court in order for it to determine whether it collided with this Court's opinion of "natural" right and justice. In effect, the *Slaughterhouse* cases rejected the very natural justice formula the Court today embraces. The Court did not meet the question of whether the safeguards of the Bill of Rights were protected against state invasion by the Fourteenth Amendment. And it specifically did not say as the Court now does, that particular provisions of the Bill of Rights could be breached by states in part, but not breached in other respects, according to this Court's notions of "civilized standards," "canons of decency," and "fundamental justice."

five years, have utterly disregarded the behest." But since there was no contention that the Bill of Rights Amendment prohibited monopoly, this statement, in the context it was quoted, is hardly an indication that the Court was presented with documented argument on the question of whether the Fourteenth Amendment made the Bill of Rights applicable to the States.

Later, but prior to the *Twining* case, this Court decided that the following were not "privileges or immunities" of national citizenship, so as to make them immune against state invasion: the Eighth Amendment's prohibition against cruel and unusual punishment, *In re Kemmler*, 136 U. S. 436; the Seventh Amendment's guarantee of a jury trial in civil cases, *Walker v. Sauvinet*, 92 U. S. 90; the Second Amendment's "right of the people to keep and bear Arms . . .," *Presser v. Illinois*, 116 U. S. 252; the Fifth and Sixth Amendments' requirements for indictment in capital or other infamous crimes, and for trial by jury in criminal prosecutions, *Maxwell v. Dow*, 176 U. S. 581. While it can be argued that these cases implied that no one of the provisions of the Bill of Rights was made applicable to the states as attributes of national citizenship, no one of them expressly so decided. In fact, the Court in *Maxwell v. Dow*, *supra* at 597-598, concluded no more than that "the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government." *Cf. Palko v. Connecticut*, 302 U. S. 319, 329.

After the *Slaughterhouse* decision, the Court also said that states could, despite the "due process" clause of the Fourteenth Amendment, take private property without just compensation, *Davidson v. New Orleans*, 96 U. S. 97, 105; *Pumpelly v. Green Bay Co.*, 13 Wall., 166, 176, 177; abridge the freedom of assembly guaranteed by the First Amendment, *United States v. Cruikshank*, 92 U. S. 542; see also *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 543; *Patterson v. Colorado*, 205 U. S. 254; *cf. Gitlow v. New York*, 268 U. S. 652, 666 (freedom of speech); prosecute for crime by information rather than indictment, *Hurtado v. People of California*, 110 U. S. 516; regulate the price for storage of grain in warehouses and

elevators, *Munn v. Illinois*, 94 U. S. 113. But this Court also held in a number of cases that colored people must, because of the Fourteenth Amendment, be accorded equal protection of the laws. See, e. g., *Strauder v. West Virginia*, 100 U. S. 303; cf. *Virginia v. Rives*, 100 U. S. 313; see also *Yick Wo. v. Hopkins*, 118 U. S. 356.

Thus, up to and for some years after 1873, when *Munn v. Illinois*, *supra*, was decided, this Court steadfastly declined to invalidate states' legislative regulation of property rights or business practices under the Fourteenth Amendment unless there were racial discrimination involved in the state law challenged. The first significant breach in this policy came in 1889, in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418.* A state's railroad rate regulatory statute was there stricken as violative of the due process clause of the Fourteenth Amendment. This was accomplished by reference to a due process formula which did not necessarily operate so as to protect the Bill of Rights' personal liberty safeguards, but which gave a new and hitherto undiscovered scope for the Court's use of the due process clause to protect property rights under natural law concepts. And in 1896, in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, this Court, in effect, overruled *Davidson v. New Orleans*, *supra*, by holding, under the new due process-natural law formula, that the Fourteenth Amendment forbade a state from taking private property for public use without payment of just compensation.†

* See *San Mateo County v. Southern P. R. Co.*, 116 U. S. 138; *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394, 396; Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale, L. J. 371, 48 L. J. 171.

† This case was decided after *Hurtado* but before *Twining*. It apparently was the first decision of this Court which brought in a Bill of Rights provision under the due process clause. In *Davidson v. New Orleans*, 96 U. S. 97, 105 the Court had refused to make such a hold-

Following the pattern of the new doctrine formalized in the foregoing decisions, the Court in 1896 applied the due process clause to strike down a state statute which had forbidden certain types of contracts. *Allgeyer v. Louisiana*, 165 U. S. 578. Cf. *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 316, 318-319. In doing so, it substantially adopted the rejected argument of counsel in the *Slaughterhouse* cases, that the Fourteenth Amendment guarantees the liberty of all persons under "natural law" to engage in their chosen business or vocation. In the *Allgeyer* opinion, *id.* at 589, the Court quoted with approval the concurring opinion of Mr. Justice Bradley in a second *Slaughterhouse* case, *Butchers' Unions Co. v. Crescent City Co.*, 111 U. S. 746, 762, 764, 765, which closely followed one phase of the argument of his dissent in the original *Slaughterhouse* cases—not that phase which argued that the Bill of Rights was applicable to the States. And in 1905, three years before the *Twining* case, *Lochner v. New York*, 198 U. S. 45, followed the argument used in *Allgeyer* to hold that the due process clause was violated by a state statute which limited the employment of bakery workers to sixty hours per week and ten hours per day.

ing, saying that "it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject [just compensation], in immediate juxtaposition in the fifth amendment with the one we are now construing [due process], was left out, and this [due process] was taken." Not only was the just compensation clause left out, but it was deliberately left out. A Committee on Reconstruction framed the Fourteenth Amendment, and its Journal shows that on April 21, 1866, the Committee by a 7 to 5 vote rejected a proposal to incorporate the just compensation clause in the Fourteenth Amendment. Journal of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866), reprinted as Sen. Doc. No. 711, 63d Cong., 3d Sess. (1915) 29. As shown by the history of the Amendment's passage, however, the Framers thought that in the language they had included this protection along with all the other protections of the Bill of Rights. See Appendix, *infra*.

The foregoing constitutional doctrine, judicially created and adopted by expanding the previously accepted meaning of "due process," marked a complete departure from the *Slaughterhouse* philosophy of judicial tolerance of state regulation of business activities. Conversely, the new formula contracted the effectiveness of the Fourteenth Amendment as a protection from state infringement of individual liberties enumerated in the Bill of Rights. Thus the Court's second-thought interpretation of the Amendment was an about face from the *Slaughterhouse* interpretation and represented a failure to carry out the avowed purpose of the Amendment's sponsors.¹⁰ This reversal is dramatized by the fact that the *Hurtado* case, which had rejected the due process clause as an instrument for preserving Bill of Rights liberties and privileges, was cited as authority for expanding the scope of that clause so as to permit this Court to invalidate all state regulatory legislation it believed to be contrary to "fundamental" principles.

The *Twining* decision, rejecting the compelled testimony clause of the Fifth Amendment, and indeed rejecting all the Bill of Rights, is the end product of one phase of this philosophy. At the same time, that decision consolidated the power of the Court assumed in past cases

¹⁰ One writer observed, "That the Supreme Court has, on the one hand, refused to give this Amendment its evident meaning and purpose, thus completely defeating the intention of the Congress that framed it and the people who adopted it. But, on the other hand, the Court has put into it a meaning which had never been intended either by its framers or adopters, thus in effect adopting a new amendment and augmenting its power by constituting itself that 'perpetual censor upon all legislation of the state,' which Justice Miller was afraid the Court would become if the Fourteenth Amendment were interpreted according to its true meaning and given the full effect intended by the people when they adopted it." 2 Boudin, *Government by Judiciary* (1932) 117. See also Haines, *The Revival of Natural Law Concepts* (1930) 143-166; Fairman, *Mr. Justice Miller and the Supreme Court* (1939) c. VII.

by laying broader foundations for the Court to invalidate state and even federal regulatory legislation. For the *Twining* decision, giving separate consideration to "due process" and "privileges or immunities," went all the way to say that the "privileges or immunities" clause of the Fourteenth Amendment "did not forbid the States to abridge the personal rights enumerated in the first eight Amendments." . . . " *Twining v. New Jersey*, *supra* 99. And in order to be certain, so far as possible, to leave this Court wholly free to reject all the Bill of Rights as specific restraints upon state action, the decision declared that even if this Court should decide that the due process clause forbids the states to infringe personal liberties guaranteed by the Bill of Rights, it would do so, not "because those rights are incorporated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Ibid.*

At the same time that the *Twining* decision held that the states need not conform to the specific provisions of the Bill of Rights, it consolidated the power that the Court had assumed under the due process clause by laying even broader foundations for the Court to invalidate state and even federal regulatory legislation. For under the *Twining* formula, which includes non-regard for the first eight amendments, what are "fundamental rights" and in accord with "canons of decency," as the Court said in *Twining*, and today reaffirms, is to be independently "ascertained from time to time by judicial action. . . ." *Id.* at 101; "what is due process of law depends on circumstances." *Moyer v. Peabody*, 212 U. S. 78, 84. Thus the power of legislatures became what this Court would declare it to be at a particular time independently of the specific guarantees of the Bill of Rights such as the right to freedom of speech, religion and assembly, the right to just compensation for property taken for a public purpose, the right to jury trial or the right to be

secure against unreasonable searches and seizures. Neither the contraction of the Bill of Rights safeguards¹¹ nor the invalidation of regulatory laws¹² by this Court's appraisal of "circumstances" would readily be classified as the most satisfactory contribution of this Court to the nation. In 1912, four years after the *Twining* case was decided, a book written by Mr. Charles Wallace Collins gave the history of this Court's interpretation and application of the Fourteenth Amendment up to that time. It is not necessary for one fully to agree with all he said in order to appreciate the sentiment of the following comment concerning the disappointments caused by this Court's interpretation of the Amendment.

"... It was aimed at restraining and checking the powers of wealth and privilege. It was to be a charter of liberty for human rights against property rights. The transformation has been rapid and complete. It operates today to protect the rights of property to the detriment of the rights of man. It has become the

¹¹ See cases collected p. 11 *supra*. Other constitutional rights left unprotected from state violation are, for example, right to counsel, *Betts v. Brady*, 316 U. S. 455; privilege against self-incrimination, *Feldman v. United States*, 322 U. S. 487, 490.

¹² Examples of regulatory legislation invalidated are: state ten hour law for baking employees, *Lochner v. New York*, 198 U. S. 45; cf. *Muller v. Oregon*, 208 U. S. 412; District of Columbia minimum wage for women, *Adkins v. Children's Hospital*, 261 U. S. 525; *Morehead v. New York*, 298 U. S. 587; but cf. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; state law making it illegal to discharge employee for membership in a union, *Coppage v. Kansas*, 236 U. S. 1; cf. *Adair v. United States*, 208 U. S. 161; state law fixing price of gasoline, *Williams v. Standard Oil Co.*, 278 U. S. 235; state taxation of bonds, *Baldwin v. Missouri*, 281 U. S. 586; state law limiting amusement ticket brokerage, *Ribnik v. McBride*, 277 U. S. 350; law fixing size of loaves of bread to prevent fraud on public, *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504; cf. *Schmidinger v. Chicago*, 226 U. S. 578.

Magna Charta of accumulated and organized capital." Collins, *The Fourteenth Amendment and the States*, (1912) 137-8.

That this feeling was shared, at least in part, by members of this Court is revealed by the vigorous dissents that have been written in almost every case where the *Twining* and *Hurtado* doctrines have been applied to invalidate state regulatory laws.¹³

Later decisions of this Court have completely undermined that phase of the *Twining* doctrine which broadly precluded reliance on the Bill of Rights to determine what is and what is not a "fundamental" right. Later cases have also made the *Hurtado* case an inadequate support for this phase of the *Twining* formula. For despite *Hurtado* and *Twining*, this Court has now held that the Fourteenth Amendment protects from state invasion the following "fundamental" rights safeguarded by the Bill of Rights: right to counsel in criminal cases, *Powell v. Alabama*, 287 U. S. 45, 67, limiting the *Hurtado* case; see also *Betts v. Brady*, 316 U. S. 455, and *DeMeleer v. Michigan*, — U. S. —; freedom of assembly, *DeJonge v. Oregon*, 299 U. S. 353, 364; at the very least, certain types of cruel and unusual punishment and former jeopardy, *State of Louisiana ex rel. Francis v. Resweber* — U. S. —; the right of an accused in a criminal case to be informed of the charge against him, see *Snyder v. Massachusetts*, 291 U. S. 97, 105; the right to receive just compensation on account of taking private property for public use, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226. And the Court has now through the Fourteenth Amendment literally and emphatically applied the First Amendment to the States in its very terms. *Everson v. Board of Education*, — U. S. —; *Board of Education v. Barnette*,

¹³ See particularly dissents in cases cited notes 11 and 12, *supra*.

319 U. S. 624, 639; *Bridges v. California*, 314 U. S. 252, 268.

In *Palko v. Connecticut*, *supra*, a case which involved former jeopardy only, this Court re-examined the path it had traveled in interpreting the Fourteenth Amendment since the *Twining* opinion was written. In *Twining* the Court had declared that none of the rights enumerated in the first eight amendments were protected against state invasion because they were incorporated in the Bill of Rights. But the Court in *Palko*, *supra*, at 323, answered a contention that all eight applied with the more guarded statement, similar to that the Court had used in *Maxwell v. Dow*, *supra* at 597, that "there is no such general rule." Implicit in this statement, and in the cases decided in the interim between *Twining* and *Palko* and since, is the understanding that some of the eight amendments do apply by their very terms. Thus the Court said in the *Palko* case that the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the "freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion . . . or the right of peaceable assembly . . . or the right of one accused of crime to the benefit of counsel. . . . In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Id.* at 324-325. The Court went on to describe the Amendments made applicable to the States as "the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption." *Id.* at 326. In

the *Twining* case fundamental liberties were things apart from the Bill of Rights. Now it appears that at least some of the provisions of the Bill of Rights in their very terms satisfy the Court as sound and meaningful expressions of fundamental liberty. If the Fifth Amendment's protection against self-incrimination be such an expression of fundamental liberty, I ask, and have not found a satisfactory answer, why the Court today should consider that it should be "absorbed" in part but not in full? Cf. Warren, *The New Liberty under the Fourteenth Amendment*, 39 *Harv. L. Rev.* 431, 458-461 (1925). Nothing in the *Palko* opinion requires that when the Court decides that a Bill of Rights provision is to be applied to the States, it is to be applied piecemeal. Nothing in the *Palko* opinion recommends that the Court apply part of an amendment's established meaning and discard that part which does not suit the current style of fundamentals.

The Court's opinion in *Twining*, and the dissent in that case, made it clear that the Court intended to leave the states wholly free to compel confessions, so far as the Federal Constitution is concerned. *Twining v. New Jersey*, *supra*, see particularly pp. 111-114, 125-126. Yet in a series of cases since *Twining* this Court has held that the Fourteenth Amendment does bar all American courts, state or federal, from convicting people of crime on coerced confessions. *Chambers v. Florida*, 399 U. S. 227; *Ashcraft v. Tennessee*, 322 U. S. 143, 154-155, and cases cited. Federal courts cannot do so because of the Fifth Amendment. *Bram v. United States*, 168 U. S. 532, 542, 562-563. And state courts cannot do so because the principles of the Fifth Amendment are made applicable to the States through the Fourteenth by one formula or another. And taking note of these cases, the Court is careful to point out in its decision today that coerced confessions violate

the Federal Constitution if secured "by fear of hurt, torture or exhaustion." Nor can a state, according to today's decision, constitutionally compel an accused to testify against himself by "any other type of coercion that falls within the scope of due process." Thus the Court itself destroys or at least drastically curtails the very *Twining* decision it purports to reaffirm. It repudiates the foundation of that opinion, which presented much argument to show that compelling a man to testify against himself does not "violate" a "fundamental" right or privilege.

It seems rather plain to me why the Court today does not attempt to justify all of the broad *Twining* discussion. That opinion carries its own refutation on what may be called the factual issue the Court resolved. The opinion itself shows, without resort to the powerful argument in the dissent of Mr. Justice Harlan, that outside of Star Chamber practices and influences, the "English-speaking" peoples have for centuries abhorred and feared the practice of compelling people to convict themselves of crime. I shall not attempt to narrate the reasons. They are well known and those interested can read them in both the majority and dissenting opinions in the *Twining* case, in *Boyd v. United States*, 116 U. S. 616, and in the cases cited in notes 8, 9, 10, and 11 of *Ashcraft v. Tennessee*, *supra*. Nor does the history of the practice of compelling testimony in this country, relied on in the *Twining* opinion, support the degraded rank which that opinion gave the Fifth Amendment's privilege against compulsory self-incrimination. I think the history there recited by the Court belies its conclusion.

The Court in *Twining* evidently was forced to resort for its degradation of the privilege to the fact that Governor Winthrop in trying Mrs. Ann Hutchison in 1627 was evidently "not aware of any privilege against self-incrimination or conscious of any duty to respect it." *Id.* at 103-

104. Of course not.¹⁴ Mrs. Hutchison was tried, if trial it can be called, for holding unorthodox religious views.¹⁵ People with a consuming belief that their religious convictions must be forced on others rarely ever believe that the unorthodox have any rights which should or can be right-fully respected. As a result of her trial and compelled admissions, Mrs. Hutchison was found guilty of unorthodoxy and banished from Massachusetts. The lamentable experience of Mrs. Hutchison and others contributed to the overwhelming sentiment that demanded adoption of a Constitutional Bill of Rights. The founders of this Government wanted no more such "trials" and punishments as Mrs. Hutchison had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and

¹⁴ Actually it appears that the practice of the Court of Star Chamber of compelling an accused to testify under oath in Lilburn's trial, 3 Howard State Trials 1315; 4 *id.* 1269, 1280, 1292, 1342, had helped bring to a head the popular opposition which brought about the demise of that engine of tyranny. 16 Car. I. cc. 10, 11. See 8 Wigmore, Evidence (1940) 292, 298; Pittman, The Colonial and Constitutional History of the Privilege Against Self-incrimination, 21 Va. L. Rev. 763, 774 (1935). Moreover, it has been pointed out that seven American state constitutions guaranteed a privilege against self-incrimination prior to 1789. Pittman, *supra*, 765; Md. Const. (1776), 1 Peore Constitutions (1878) 818; Mass. Const. (1780), *id.* at 958; N. C. Const. (1776), 2 *id.* at 1409; N. H. Const. (1784), *id.* at 1282; Pa. Const. (1776), *id.* at 1542; Vt. Const. (1777), *id.* at 1860; Va. Bill of Rights (1776), *id.* at 1909.

By contrast it has been pointed out that freedom of speech was not protected by colonial or state constitutions prior to 1789 except for the right to speak freely in sessions of the legislatures. See Warren, The New Liberty under the Fourteenth Amendment, 59 Harv. L. Rev. 431, 461 (1926).

¹⁵ For accounts of the proceedings against Mrs. Hutchison, see 1 Hart, American History Told by Contemporaries, 382 ff (1897); Beard, The Rise of American Civilization (1930) 57; 1 Andrews, The Colonial Period of American History, 485 (1934).

that would, among other things, strip courts and all public officers of a power to compel people to testify against themselves. See *Pittman*, *supra* at 789.

I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket" as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights, I think the possibility is entirely too speculative to agree to take that

course. I would therefore hold in this case that the full protection of the Fifth Amendment's proscription against compelled testimony must be afforded by California. This I would do because of reliance upon the original purpose of the Fourteenth Amendment.

It is an illusory apprehension that literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total of the powers of this Court to invalidate state legislation. The Federal Government has not been harmfully burdened by the requirement that enforcement of federal laws affecting civil liberty conform literally to the Bill of Rights. Who would advocate its repeal? It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights.¹⁶ But this formula also has been used in the past and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.

Since *Marbury v. Madison*, 1 Cranch 137, was decided, the practice has been firmly established for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the

¹⁶ See, e. g., *Betts v. Brady*, 316 U. S. 455; *Feldman v. United States*, 322 U. S. 487.

particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; ¹⁷ to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. ¹⁸ "In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute

¹⁷ See *Chambers v. Florida*, 309 U. S. 227; *Polk v. Glover*, 305 U. S. 5, 12-19; *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 423, 428; *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U. S. 287, 299, 301; *Betts v. Brady*, 316 U. S. 455, 474; *International Shoe Co. v. Washington*, 326 U. S. 310, 322, 324-326; *Feldman v. United States*, 322 U. S. 487, 494, 495; *Federal Power Commission v. Hope Nat'l. Gas Co.*, 320 U. S. 591, 619, 620; *United Gas Co. v. Texas*, 303 U. S. 123, 146, 153; *Gibbs v. Buck*, 307 U. S. 66, 79.

¹⁸ An early and prescient exposé of the inconsistency of the natural law formula with our constitutional form of government appears in the concurring opinion of Mr. Justice Iredell in *Calder v. Bull*, 3 Dall. 386, 398, 399: "If any act of Congress, or the Legislature of a state, violates . . . constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."

See also Haines, *The Law of Nature in State and Federal Decisions*, 25 *Yale L. J.* 617 (1916); *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures*, 2 *Tex. L. Rev.* 257 (1924), 3 *Tex. L. Rev.* 1 (1924); *The Revival of Natural Law Concepts* (1930); *The American Doctrine of Judicial Supremacy* (1932); *The Role of the Supreme Court in American Government and Politics* (1944).

policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people." *Power Commission v. Pipeline Co.*, 315 U. S. 575, 599, 601, n. 4.

MR. JUSTICE DOUGLAS joins in this opinion.

APPENDIX.

I.

The legislative origin of the first section of the Fourteenth Amendment seems to have been in the Joint Committee on Reconstruction. That Committee had been appointed by a concurrent resolution of the House and Senate with authority to report "by bill or otherwise" whether the former Confederate States "are entitled to be represented in either House of Congress." Cong. Globe, 39th Cong., 1st Sess. (1865) 6, 30. The broad mission of that Committee was revealed by its very first action of sending a delegation to President Johnson requesting him to "defer all further executive action in regard to reconstruction until this committee shall have taken action on that subject." Journal of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866), reprinted as Sen. Doc. No. 711, 63d Cong., 3d Sess. (1915) 6. It immediately set about the business of drafting constitutional amendments which would outline the plan of reconstruction which it would recommend to Congress. Some of those proposed amendments related to suffrage and representation in the South. Journal, 7. On January 12, 1866, a subcommittee, consisting of Senators Fessenden (Chairman of the Reconstruction Committee) and Howard, and Congressmen Stevens, Bingham and Conkling, was appointed to consider those suffrage proposals. Journal, 9. There was at the same time referred to this Committee a "proposed amendment to the Constitution" submitted by Mr. Bingham that:

"The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property." Journal, 9. Another proposed amendment that "All laws, State or national, shall operate impartially and equally on all persons without regard to

race, or color,"¹ was also referred to the Committee, Journal, 9. On January 24, 1866, the subcommittee reported back a combination of these two proposals which was not accepted by the full Committee. Journal, 13, 14. Thereupon the proposals were referred to a "select committee of three," Bingham, Boutwell and Rogers. Journal, 14. On January 27, 1866, Mr. Bingham on behalf of the select committee, presented this recommended amendment to the full committee:

"Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges." Journal, 14. This was not accepted. But on February 3, 1866, Mr. Bingham submitted an amended version: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment)." This won committee approval, Journal, 17, and was presented by Mr. Bingham to the House on behalf of the Committee on February 13, 1866. Cong. Globe, *supra*, 813.

II.

When, on February 26, the proposed amendment came up for debate, Mr. Bingham stated that "by order . . . of the committee . . . I propose adoption of this amendment." In support of it he said:

¹ Mr. Bingham and Mr. Stevens had introduced these same proposed amendments in the House prior to the establishment of the Reconstruction Committee. Cong. Globe, 39th Cong., 1st Sess. (1865) 10, 14.

"... The amendment proposed, stands in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers. Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States. The residue of the resolution, as the House will see by a reference to the Constitution, is the language of the second section of the fourth article, and of a portion of the fifth amendment adopted by the First Congress in 1789, and made part of the Constitution of the country. . . .

"Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution. Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility. . . .

"And, sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive, and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States. . . ." Cong. Globe, *supra*, 1033-1034.

Opposition speakers emphasized that the Amendment would destroy state's rights and empower Congress to legislate on matters of purely local concern. Cong. Globe, *supra*, 1054, 1057, 1063-1065, 1083, 1085-1087. See also.

id. at 1082. Some took the position that the Amendment was unnecessary because the Bill of Rights were already secured against state violation. *Id.* at 1059, 1066, 1088. Mr. Bingham joined issue on this contention:

"The gentleman seemed to think that all persons could have remedies for all violations of their rights of 'life, liberty, and property' in the Federal courts.

"I ventured to ask him yesterday when any action of that sort was ever maintained in any of the Federal courts of the United States to redress the great wrong which has been practiced, and which is being practiced now in more States than one of the Union under the authority of State laws, denying to citizens therein equal protection or any protection in the rights of life, liberty, and property.

"... A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.

"Mr. Speaker, on this subject I refer the House and the country to a decision of the Supreme Court, to be found in 7 Peters, 247, in the case of *Barron vs. The Mayor and City Council of Baltimore*, involving the question whether the provisions of the fifth article of the amendments to the Constitution are binding upon the State of Maryland and to be enforced in the Federal courts. The Chief Justice says:

"The people of the United States framed such a Government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this Government were to be exercised by itself;

and the limitations of power, if expressed in general terms, are naturally, and we think necessarily, applicable to the Government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes.

"If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States."

"I read one further decision on this subject—the case of the Lessee of Livingston *vs.* Moore and others, 7 Peters, page 551. The court, in delivering its opinion, says:

"As to the Amendments of the Constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the States; and this observation disposes of the next exception, which relies on the seventh article of those amendments."

"The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of oaths enjoined upon them by their Constitution? Is the Bill of Rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.

"Mr. Speaker, it appears to me that this very provision of the bill of rights brought in question this day, upon this trial before the House, more than any other provision of the Constitution, makes that unity of government which constitutes us one people, by which and through which American nationality came to be, and only by the enforcement of which can American nationality continue to be.

"What more could have been added to that instrument to secure the enforcement of these provisions of the bill of rights in every State, other than the additional grant of power which we ask this day?"

"As slaves were not protected by the Constitution, there might be some color of excuse for the slave States in their disregard for the requirement of the bill of rights as to slaves in refusing them protection in life or property."

"But, sir, there never was even colorable excuse, much less apology, for any man North or South claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, and property. Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights. Gentlemen who oppose this amendment simply declare to these rebel States, 'Go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to the Constitution and Government of the United States.' " *Id.* at 1089-1090.

"Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reenactment of those infernal statutes . . . ? Let some man answer. Why, sir, the gentleman from New York [Mr. HALE] yesterday gave up the argument on this point. He said that the citizens must rely upon the State for their protection. I admit that such is the rule under the Constitution as it now stands." *Id.* at 1093.

As one important writer on the adoption of the Fourteenth Amendment has observed, "Mr. Bingham's speech in defense and advocacy of his amendment comprehends practically everything that was said in the press or on the floor of the House in favor of the resolution. . . ." Kendrick, *Journal of the Joint Committee on Reconstruction* (1914) 217. A reading of the debates indicates

that no member except Mr. Hale had contradicted Mr. Bingham's argument that without this Amendment the states had power to deprive persons of the rights guaranteed by the first eight amendments. Mr. Hale had conceded that he did not "know of a case where it has ever been decided that the United States Constitution is sufficient for the protection of the liberties of the citizen." Cong. Globe, *supra*, at 1064. But he was apparently unaware of the decision of this Court in *Barron v. Baltimore*, *supra*. For he thought that the protections of the Bill of Rights had already been "thrown over us in some way, whether with or without the sanction of a judicial decision." And in any event, he insisted, "... the American people have not yet found that their State governments are insufficient to protect the rights and liberties of the citizen." He further objected, as had most of the other opponents to the proposal, that the Amendment authorized the Congress to "arrogate" to itself vast powers over all kinds of affairs which should properly be left to the States. Cong. Globe, *supra*, 1064-1065.

When Mr. Hotchkiss suggested that the amendment should be couched in terms of a prohibition against the States in addition to authorizing Congress to legislate against state deprivations of privileges and immunities, debate on the amendment was postponed until April 2, 1866. Cong. Globe, *supra*, 1095.

III.

Important events which apparently affected the evolution of the Fourteenth Amendment transpired during the period during which discussion of it was postponed. The Freedman's Bureau Bill which made deprivation of certain civil rights of negroes an offense punishable by military tribunals had been passed. It applied, not to the entire country, but only to the South. On February 19, 1866, President Johnson had vetoed the bill principally on the ground that it was unconstitutional. Cong. Globe,

supra, 915. Forthwith, a companion proposal known as the Civil Rights Bill empowering federal courts to punish those who deprived any person anywhere in the country of certain defined civil rights was pressed to passage. Senator Trumbull, Chairman of the Senate Judiciary Committee, who offered the bill in the Senate on behalf of that Committee, had stated that "the late slaveholding States" had enacted laws "... depriving persons of African descent of privileges which are essential to free-men. . . . (S)tatutes of Mississippi . . . provide that if any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority. Other provisions of the statute prohibit any negro or mulatto from having fire-arms; and one provision of the statute declares that for exercising the functions of a minister of the Gospel free negroes . . . on conviction, may be punished by . . . lashes. . . . Other provisions . . . prohibit free negro . . . from keeping a house of entertainment, and subject him to trial before two justices of the peace and five slaveholders for violating . . . this law. The statutes of South Carolina make it a highly penal offense for any person, white or colored, to teach slaves; and similar provisions are to be found running through all the statutes of the late slaveholding States. . . . The purpose of the bill . . . is to destroy all these discriminations. . . ." Cong. Globe, *supra*, 474.

In the House, after Mr. Bingham's original proposal for a constitutional amendment had been rejected, the suggestion was also advanced that the bill secured for all "the right to speech, . . . transit, . . . domicile, . . . the right to sue, the writ of *habeas corpus*, and the right of petition." Cong. Globe, *supra*, 1263. And an opponent of the measure, Mr. Raymond, conceded that it would guarantee to the negro "the right of free passage . . . He has a defined status . . . a right to defend himself . . . to bear

arms . . . to testify in the Federal courts . . . " Cong. Globe, *supra*, 1266-1267. But opponents took the position that without a constitutional amendment such as that proposed by Mr. Bingham, the Civil Rights Bill would be unconstitutional. Cong. Globe, *supra*, 1154-1155, 1263.

Mr. Bingham himself vigorously opposed and voted against the Bill. His objection was twofold: First, insofar as it extended the protections of the Bill of Rights as against state invasion, he believed the measure to be unconstitutional because of the Supreme Court's holding in *Barron v. Baltimore*, *supra*. While favoring the extension of the Bill of Rights guarantees as against state invasion, he thought this could be done only by passage of his amendment. His second objection to the Bill was that, in his view, it would go beyond his objective of making the states observe the Bill of Rights and would actually strip the states of power to govern, centralizing all power in the Federal Government. To this he was opposed. His views are in part reflected by his own remarks and the answers to him by Mr. Wilson. Mr. Bingham said, in part:

" . . . I do not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that Constitution. I know that the enforcement of the bill of rights is the want of the Republic. I know if it had been enforced in good faith in every State of the Union the calamities and conflicts and crimes and sacrifices of the past five years would have been impossible.

But I feel that I am justified in saying, in view of the text of the Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the Bill of Rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserve powers of the States to be enforced by State tribunals. . . .

" . . . I am with him in an earnest desire to have the bill of rights in your Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country.

" . . . I submit that the term 'civil rights' includes every right that pertains to the citizen under the Constitution, laws, and Government of this country. . . .

" . . . The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future. . . ."

"If the bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the powers of the States and prohibit such gross injustice by States, it does limit the power of Congress to prohibit any such legislation by Congress.

" . . . (T)he care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. . . ."
Cong. Globe, *supra*, 1291-1292.

Mr. Wilson, House sponsor of the Civil Rights Bill, answered Mr. Bingham's objections to it with these remarks:

"The gentleman from Ohio tells the House that civil rights involve all the rights that citizens have under the Government; that in the terms are embraced those rights which belong to the citizen of the United States as such, and those which belong to a citizen of a State as such; and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. . . ."

" . . . I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that 'no person shall be deprived of life, liberty, or property without due process of law.' I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States." Cong. Globe, *supra* at 1294.

In vetoing the Civil Rights Bill, President Johnson said among other things that the bill was unconstitutional for many of the same reasons advanced by Mr. Bingham:

"Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. . . . As respects the Territories, they come within the power of Congress, for as to them, the law-making power is the federal power; but as to the States no similar provision exist, vesting in Congress the power 'to make rules and regulations' for them." Cong. Globe, *supra*, 1679, 1680.

The bill, however, was passed over President Johnson's veto and in spite of the constitutional objections of Bingham and others. Cong. Globe, *supra*, 1809, 1861.

IV.

Thereafter the scene changed back to the Committee on Reconstruction. There Mr. Stevens had proposed an amendment, § 1 of which provided "No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Journal, 28. Mr. Bingham proposed an additional section providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Journal, 30. After the committee had twice declined to recommend Mr. Bingham's proposal, on April 28 it was accepted by the Committee, substantially in the form he had proposed it, as § 1 of the recommended Amendment. Journal, 44.

V.

In introducing the proposed Amendment to the House on May 8, 1866, Mr. Stevens speaking for the Committee said:

"The first section [of the proposed amendment] prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the equal protection of the laws.

"I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other, in

our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." *Coog. Globe*, 2459.²

On May 23, 1866, Senator Howard introduced the proposed amendment to the Senate in the absence of Senator Fessenden who was sick. Senator Howard prefaced his remarks by stating:

"I . . . present to the Senate . . . the views and the motives [of the Reconstruction Committee]. . . . One result of their investigation has been the joint resolution for the amendment of the Constitution of the United States now under consideration. . . .

"The first section of the amendment . . . submitted for the consideration of the two Houses, relates to the privileges and immunities of citizens of the several States, and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States. . . .

"It will be observed that this is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. That is its first clause, and I regard it as very important. It also prohibits each one of the States from depriving any person of life, liberty, or property without due process of law, or denying to any person within the jurisdiction of the State the equal protection of its laws.

"It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. . . . I am not aware that the Su-

² It has been said of Steven's statement: "He evidently had reference to the Bill of Rights, for it is in it that most of the privileges are enumerated, and besides it was not applicable to the States." Flack, *The Adoption of the Fourteenth Amendment* (1908) 75.

preme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guarantied. . . . But we may gather some intimation of what probably will be the opinion of the judiciary by referring to . . . *Corfield vs. Coryell* . . . 4 Washington Circuit Court Reports, page 380 (Here Senator Howard quoted at length from that opinion.)

"Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

"Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution; which I have recited, some by the first eight amendments of the Constitution; and it is a fact, well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution, or recognized by it,

are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or a prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

"Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, *supra*, 2764.

Mr. Bingham had closed the debate in the House on the proposal prior to its consideration by the Senate. He said in part:

"... (M)any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens,

not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.

"It was an approbrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment." Cong. Globe, *supra*, 2542-2543.

Both proponents and opponents of § 1 of the amendment spoke of its relation to the Civil Rights Bill which had been previously passed over the President's veto. Some considered that the amendment settled any doubts there might be as to the constitutionality of the Civil Rights Bill. Cong. Globe, 2511, 2896. Others maintained that the Civil Rights Bill would be unconstitutional unless and until the amendment was adopted. Cong. Globe, 2461, 2502, 2506, 2513, 2961, 2513. Some thought that amendment was nothing but the Civil Rights "in another shape." Cong. Globe, 2459, 2462, 2465, 2467, 2498, 2502. One attitude of the opponents was epitomized by a statement by Mr. Shanklin that the amendment strikes "down the reserved rights of the States, . . . declared by the framers of the Constitution to belong to the States exclusively and necessary for the protection of the property and liberty of the people. The first section of this proposed amendment . . . is to strike down those State rights and invest all power in General Government." Cong. Globe, *supra*, 2500. See also Cong. Globe, *supra*, 2530, 2538.

Except for the addition of the first sentence of § 1 which defined citizenship, Cong. Globe, *supra*, 2869, the amendment weathered the Senate debate without substantial

change. It is significant that several references were made in the Senate debate to Mr. Bingham's great responsibility for § 1 of the amendment as passed by the House. See *e. g.* Cong. Globe, *supra*, 2896.

VI.

Also just prior to the final votes in both Houses passing the resolution of adoption, the Report of the Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess. (1866); Sen. Rep. No. 112, 39th Cong., 1st Sess. (1866), was submitted. Cong. Globe, *supra*, 3038, 3051. This report was apparently not distributed in time to influence the debates in Congress. But a student of the period reports that 150,000 copies of the Report and the testimony which it contained were printed in order that senators and representatives might distribute them among their constituents. Apparently the Report was widely reprinted in the press and used as a campaign document in the election of 1866. Kendrick, Journal of the Joint Committee on Reconstruction (1914) 265. According to Kendrick the Report was "eagerly . . . perused" for information concerning "conditions in the South." Kendrick, *supra*, 265.

The Report of the Committee had said with reference to the necessity of amending the Constitution:

"~~The so-called Confederate States are not at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic. . . .~~" Report, *supra*, XXI.

Among the examples recited by the testimony were discrimination against negro churches and preachers by local officials and criminal punishment of those who attended objectionable church services. Report, Part II.

52. Testimony also cited recently enacted Louisiana laws which made it "a highly penal offense for anyone to do anything that might be construed into encouraging the blacks to leave the persons with whom they had made contracts for labor" Report, Part III, p. 25.³

Flack, *supra* at 142, who canvassed newspaper coverage and speeches concerning the popular discussion of the adoption of the Fourteenth Amendment, indicates that Senator Howard's speech stating that one of the purposes of the first section was to give Congress power to enforce the Bill of Rights, as well as extracts and digests of other speeches were published widely in the press. Flack summarizes his observation that

"The declarations and statements of newspapers, writers and speakers, . . . show very clearly; . . . the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not, whether the privileges guaranteed by those Amendments were to be considered as privileges secured by the Amendment, but it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it." Flack, *supra*, 153-154.

³ In a widely publicized report to the President which was also submitted to the Congress, Carl Schurz had reviewed similar incidents and emphasized the fact that negroes had been denied the right to bear arms, own property, engage in business, to testify in Court, and that local authorities had arrested them without cause and tried them without juries. Sen. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) 23, 24, 26, 36. See also Report of Commissioner of Freedman's Bureau, Exec. Doc. No. 70, 39th Cong., 1st Sess. (1866) 41, 47, 48, 233, 236, 265, 376.

VII.

Formal statements subsequent to adoption of the Amendment by the congressional leaders who participated in the drafting and enactment of it are significant. In 1871, a bill was before the House which contemplated enforcement of the Fourteenth Amendment. Mr. Garfield, who had participated in the debates on the Fourteenth Amendment in 1866, said:

"I come now to consider . . . for it is the basis of the pending bill, the fourteenth amendment. I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter." Cong. Globe, 42d Cong., 1st Sess. (App. 1871) 150.

"The next clause of the section under debate declares: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law.'

"This is copied from the fifth article of amendments, with this difference: as it stood in the fifth article it operated only as a restraint upon Congress, while here it is a direct restraint upon the governments of the States. The addition is very valuable. It realizes the full force and effect of the clause in Magna Charta, from which it was borrowed; and there is now no power in either the State or the national Government to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty, and property, except by due process of law; that is, by an impartial trial according to the laws of the land. . . ." Cong. Globe, *supra*, at 152-3.

A few days earlier, in a debate on this same bill to enforce the Fourteenth Amendment, Mr. Bingham, still a member of Congress, had stated at length his understanding of the purpose of the Fourteenth Amendment as he had originally conceived it:

"Mr. Speaker, the Honorable Gentleman from Illinois [Mr. Farnsworth] did me unwittingly, great service, when he ventured to ask me why I changed the form of the first section of the fourteenth article of amendment from the form in which I reported it to the House in February, 1866, from the Committee on Reconstruction. I will answer the gentleman, sir, and answer him truthfully. I had the honor to frame the amendment as reported in February, 1866, and the first section, as it now stands, letter for letter, and syllable for syllable, in the fourteenth article of the amendments to the Constitution of the United States, save the introductory clause defining citizens. The clause defining citizens never came from the joint Committee on Reconstruction, but the residue of the first section of the fourteenth amendment did come from the committee precisely as I wrote it and offered it in the Committee on Reconstruction, and precisely as it now stands in the Constitution. . . .

"That is the grant of power. It is full and complete. The gentleman says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is now, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.

"The gentleman ventured upon saying that this amendment does not embrace all of the amendment prepared and reported by me with the consent of the committee in Feb-

ruary, 1866. The amendment reported in February, to which the gentleman refers, is as follows: 'The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.'

"That is the amendment, and the whole of it, as reported in February, 1866. That amendment never was rejected by the House or Senate. A motion was made to lay it on the table, which was a test vote on the merits of it, and the motion failed. . . . I consented to and voted for the motion to postpone it. . . . Afterward in the joint Committee on Reconstruction, I introduced this amendment, in the precise form, as I have stated, in which it was reported, and as it now stands in the Constitution of my country. . . .

"I answer the gentleman, how I came to change the form of February to the words now in the first section of the fourteenth article of amendment, as they stand, and I trust will forever stand, in the Constitution of my country. I had read—and that is what induced me to attempt to impose by constitutional amendments new limitations upon the power of the States—the great decision of Marshall in *Barron vs. The Mayor and City Council of Baltimore*, wherein the Chief Justice said, in obedience to his official oath and the Constitution as it then was: 'The amendments [to the Constitution] contained no expression indicating an intention to apply them to the State governments. This court cannot so apply them.'—7 Peters p. 250.

"In this case the city had taken private property for public use, without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States; and only for this reason, the first eight

amendments were not limitations on the power of the States.

"And so afterward, in the case of the Lessee of Livingstone vs. Moore . . . the court ruled, 'It is now settled that the amendments [to the Constitution] do not extend to the States.' They were but limitations upon Congress. Jefferson well said of the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights. Those amendments secured the citizens against any deprivation of any essential rights of person by any act of Congress, and among other things thereby they were secured in their persons, houses, papers, and effects against unreasonable searches and seizures, in the inviolability of their homes in times of peace, by declaring that no soldier shall in time of peace be quartered in any house without the consent of the owner. They secured trial by jury; they secured the right to be informed of the nature and cause of accusation which might in any case be made against them; they secured compulsory process for witnesses, and to be heard in defense by counsel. They secured, in short, all the rights dear to the American citizen. And yet it was decided, and rightfully, that these amendments, defining and protecting the rights of men and citizens, were only limitations on the power of Congress, not on the power of the States.

"In re-examining that case of Barron, Mr. Speaker, after my struggle in the House in February, 1866, to which the gentleman has alluded, I noted and apprehended, as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: 'Had the framers of these amendments intended them to be limitations on the power of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.' Barron vs. The Mayor, &c., 7 Peters 250.

"Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said 'No state shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;' imitating their example and imitating it to the letter, I prepared the provision of the first section of the Fourteenth Amendment as it stands in the Constitution, as follows: 'No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person, of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"I hope the gentleman now knows why I changed the form of the amendment of February, 1866.

"Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows: [Here Mr. Bingham recited verbatim the first eight articles.]

"These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, 'no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States,' are an express prohibition upon every State of the Union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make.

"Mr. Speaker, that decision in the fourth of Washington's Circuit Court Reports, to which my learned colleague . . . has referred is only a construction of the second section, fourth article of the original Constitution, to wit,

'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' In that case the court only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own.

"In the case of the United States *vs.* Primrose, Mr. Webster said that—'For the purposes of trade, it is evidently not in the power of any State to impose any hindrance or embarrassment, etc., upon citizens of other States, or to place them, on coming there, upon a different footing from her own citizens.' 6 *Webster's Works*, 112.

"The learned Justice Story declared that—'The intention of the clause ('The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States') was to confer on the citizens of each State a general citizenship, and communicated all the privileges and immunities which a citizen of the same State would be entitled to under the same circumstances.' *Story on The Constitution*, Vol. 2, page 605.

"Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provisions of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?

"Sir, before the ratification of the fourteenth amendment, the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was so done in half the States of the Union. Before that a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter,

or break with him his crust of bread. The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America; in the Supreme Court of the United States; but nevertheless affirmed in obedience to the requirements of the Constitution. . . .

"Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can imitate the bad example of Illinois, to which I have referred, nor can any State ever repeat the example of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lesson of the New Testament, to know that new evangel, 'The pure in heart shall see God.'

"... You say it is centralized power to restrain by unlawful combinations in States against the Constitution and citizens of the United States, to enforce the Constitution and the rights of United States citizen [*sic.*] by national law, and to disperse by force, if need be, combinations too powerful to be overcome by judicial process, engaged in trampling underfoot the life and liberty, or destroying the property of the citizen.

"The States never had the right, though they had the power, to inflict wrongs upon free citizens by denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States, did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the

press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?

"Mr. Speaker, I respectfully submit to the House and country that, by virtue of these amendments, it is competent for Congress today to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that state without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of its property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances. For these are of the rights of citizens of the United States defined in the Constitution and guaranteed by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered. . . ." Cong. Globe, App. 1st Sess., 42d Cong., pp. 81, 83-85.

And the day after Mr. Garfield's address, Mr. Dawes, also a member of the 39th Congress, stated his understanding of the meaning of the Fourteenth Amendment:

"Sir, in the progress of constitutional liberty, when, in addition to those privileges and immunities [secured by the original Constitution], there were added from time to time, by amendments, others, and these were

augmented, amplified, and secured and fortified in the buttresses of the Constitution itself, he hardly comprehended the full scope and measure of the phrase which appears in this bill. Let me read, one by one, these amendments, and ask the House to tell me when and where and by what chosen phrase has man been able to bring before the Congress of the country a broader sweep of legislation than my friend has in the bill here. In addition to the original rights secured to him in the first article of amendments, he had secured the free exercise of his religious belief, and freedom of speech and the press. Then he had secured to him the right to keep and bear arms in his defense. Then, after that, his home was secured in time of peace from the presence of a soldier; and, still further, sir, his house, his papers, and his effects were protected against unreasonable seizure. . . .

"Then, again, as if that were not enough, by another amendment he was secured against trial for any alleged offense except it be on the presentation of a grand jury, *and he was protected against ever giving testimony against himself* [Italics supplied.] Then, sir, he was guaranteed a speedy trial, and the right to confront every witness against him. Then in every controversy which should arise he had the right to have it decided by a jury of his peers. Then, sir, by another amendment, he was never to be required to give excessive bail, or be punished by cruel and unusual punishment. And still later, sir, after the bloody sacrifice of our four-years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens who sprang into being, as it were, by the wave of a magic wand. Still further, every person born on the soil was made a citizen and clothed with them all.

"It is all these, Mr. Speaker, which are comprehended in the words 'American citizen,' and it is to protect and to secure him in these rights, privileges, and immunities this

bill is before the House. And the question to be settled is, whether by the Constitution, in which these provisions are inserted, there is also power to guard, protect, and enforce these rights of the citizens; whether they are more, indeed, than a mere declaration of rights, carrying with it no power of enforcement. . . . Cong. Globe, 42d Cong., 1st Sess. Part I. (1871) 475, 476.

VIII.

Hereafter appear statements in opinions of this Court rendered after adoption of the Fourteenth Amendment and prior to the *Twining* case which indicate a belief that the Fourteenth Amendment, and particularly its privileges and immunities clause, was a plain application of the Bill of Rights to the states. See p. 8, note 6, *supra*.

In the *Slaughterhouse* cases, 16 Wall. 36, 83, the dissenting opinion of Mr. Justice Field emphasized that the Fourteenth Amendment made a "citizen of a State . . . a citizen of the United States residing in that State." *Id.* at 95. But he enunciated a relatively limited number of privileges and immunities which he considered protected by national power from state interference by the Fourteenth Amendment. Apparently dissatisfied with the limited interpretation of Mr. Justice Field, Mr. Justice Bradley, although agreeing with all that Mr. Justice Field had said, wrote an additional dissent. *Id.* at 111. In it he said: .

"But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but

they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal Government; such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law*. These, and still others are specified in the original Constitution; or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not." *Id.* at 118-119; see also *id.* at 120-122.

Mr. Justice Swayne joined in this opinion but added his own not inconsistent views. *Id.* at 124.

But in *Walker v. Sauvinet*, 92 U. S. 90, 92, when a majority of the Court held that "A trial by jury in suits at common law pending in the State courts is not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge," Mr. Justice Field and Mr. Justice Clifford dissented from "the opinion and judgment of the Court." *Id.* at 93.

In *Spies v. Illinois*, 123 U. S. 131, counsel for the petitioners, Mr. J. Randolph Tucker, after enumerating the protection of the Bill of Rights, took this position:

"... Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare and recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.

"... the rights declared in the first ten Amendments are to be regarded as privileges and immunities of citizens of the United States, which as I insist, are protected as such by the Fourteenth Amendment." *Id.* at 151, 152.

The constitutional issues raised by this argument were not reached by the Court which disposed of the case on jurisdictional grounds.

However, Mr. Justice Field, in his dissenting opinion in *O'Neil v. Vermont*, 144 U. S. 323, 337, 361, stated that "after much reflection" he had become persuaded that the definition of privileges and immunities, given by Mr. Tucker in *Spies v. Illinois*, *supra*, "is correct." And Mr. Justice Field went on to say that.

"While, therefore, the ten Amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitation, are applicable only to the Federal Government, and not to the States, yet, so far as they declare or recog-

nize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then, every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both state and Federal action. The State cannot apply to him, any more than the United States, the torture, the rack or thumb-screw, or any more than it can deny to him security in his house, papers and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights, as those of citizens of the United States, find their recognition and guaranty against Federal action in the Constitution of the United States, and against State action in the Fourteenth Amendment. The inhibition by that Amendment is not the less valuable and effective because of the prior and existing legislation against such action in the constitutions of the several States. . . . " *Id.* at 363.

Mr. Justice Harlan, and apparently Mr. Justice Brewer, concurred in this phase of Mr. Justice Field's dissent. *Id.* at 366, 370, 371.

For further exposition of these views see also the vigorous dissenting opinions of Mr. Justice Harlan in *Hurtado v. California*, 110 U. S. 516, 538, and *Maxwell v. Dow*, 176 U. S. 581, 605, as well as his dissenting opinion in *Twining v. New Jersey*, 211 U. S. 78, 114.

SUPREME COURT OF THE UNITED STATES

No. 102.—OCTOBER TERM, 1946.

Admiral Dewey Adamson, Appellant,	} Appeal from the Supreme Court of the State of California.
v.	
People of the State of California.	

[June 23, 1947.]

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE concurs, dissenting.

While in substantial agreement with the views of MR. JUSTICE BLACK, I have one reservation and one addition to make.

I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

That point, however, need not be pursued here inasmuch as the Fifth Amendment is explicit in its provision that no person shall be compelled in any criminal case to be a witness against himself. That provision, as MR. JUSTICE BLACK demonstrates, is a constituent part of the Fourteenth Amendment.

Moreover, it is my belief that this guarantee against self-incrimination has been violated in this case. Under California law, the judge or prosecutor may comment on the failure of the defendant in a criminal trial to explain or deny any evidence or facts introduced against him. As interpreted and applied in this case, such a provision compels a defendant to be a witness against himself in one of two ways:

ADAMSON v. CALIFORNIA.

1. If he does not take the stand, his silence is used as the basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself. And silence can be as effective in this situation as oral statements.

2. If he does take the stand, thereby opening himself to cross-examination, so as to overcome the effects of the provision in question, he is necessarily compelled to testify against himself. In that case, his testimony on cross-examination is the result of the coercive pressure of the provision rather than his own volition.

Much can be said pro and con as to the desirability of allowing comment on the failure of the accused to testify. But policy arguments are to no avail in the face of a clear constitutional command. This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers. To borrow language from *Wilson v. United States*, 149 U. S. 60, 66: "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand."

We are obliged to give effect to the principle of freedom from self-incrimination. That principle is as applicable where the compelled testimony is in the form of silence as where it is composed of oral statements. Accordingly, I would reverse the judgment below.